Supreme Court, U. S.
FILED
MAY 13 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1614

HARPER SIBLEY, JR.,

Petitioner,

v.

TANDY CORPORATION, ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MARVIN S. SLOMAN
ROBERT L. BLUMENTHAL
EARL F. HALE, JR.
ROD PHELAN
Counsel for Petitioner

Of Counsel:

CARRINGTON, COLEMAN, SLOMAN, JOHNSON & BLUMENTHAL
3000 One Main Place
Dallas, Texas 75250
(214) 741-2121

Counsel of Record:
MARVIN S. SLOMAN
3000 One Main Place
Dallas, Texas 75250
(214) 741-2121

INDEX

	Page
Opinion Below	1
Jurisdiction	1-2
Questions Presented	2
Statutory Provisions Involved	2
Statement of the Case	3-6
Reasons for Granting the Writ	6-23
Conclusion	23

Appendix:

1. Arbitration Opinion of the United States District Court for the Northern District of Texas, Dallas Division A-1–A-3
2. Principal Opinion of the United States Court of Appeals for the Fifth Circuit A-4–A-13
3. Opinion of the United States Court of Appeals for the Fifth Circuit, Denying Rehearing A-14–A-16

CITATIONS
Cases

Page

A. & E. Plastik Pak Co., Inc. v. Monsanto Co.,
396 F.2d 710 (9th Cir. 1968) 9n

Aimcee Wholesale Corp. v. Tomar Products, Inc.,
21 N.Y.2d 621, 289 N.Y.S.2d 968 (1968) 9n

Alexander v. Gardner-Denver Company,
415 U.S. 36 (1974) 21

American Safety Equipment Corp.
v. J. P. Maguire and Co. v. Hickok Mfg. Co., Inc.,
391 F.2d 821 (2d Cir. 1968) 9n

Ayres v. Merrill Lynch, Pierce, Fenner & Smith,
538 F.2d 532 (3rd Cir. 1976), *cert. denied*—U.S.— 7n, 20

Borel v. United States Cas. Co.,
233 F.2d 385 (5th Cir. 1956) 22n

Bullen v. DeBretteville, 239 F.2d 824
9th Cir. 1956), *cert. denied* 353 U.S. 947 ..... 22n

Collins Radio Company v. Ex-Cell-O Corporation,
467 F.2d 995 (8th Cir. 1972) 8

Colonial Realty Corp. v. Bache & Co.,
358 F.2d 178 (2d Cir. 1966) 7n

Danford v. Schwabacher, 342 F.Supp. 65
(N.D. Ca. 1972) 7n

Frier Industries, Inc. v. Glickman, ¶94,845 Fed. Sec. L. Rep.
[1974-75 Transfer Binder] (S.D.N.Y. 1974) 8, 11

Galt v. Libbey-Owens-Ford Glass Co.,
376 F.2d 711 (7th Cir. 1967) 19-20

Loux v. Rhay, 375 F.2d 55 (9th Cir. 1967) 22n

Page

Lubin v. Chicago Title and Trust Company,
260 F.2d 411 (7th Cir. 1958) 22n

Macchiavelli v. Shearson, Hammill & Co., Inc.,
384 F.Supp. 21 (E.D.Ca. 1974) 8-9, 11

Maheu v. Reynolds & Co., 282 F.Supp. 423
(S.D.N.Y. 1968) 7n

Moran v. Paine, Webber, Jackson & Curtis,
389 F.2d 242 (3rd Cir. 1968) 7n

Nisbet v. Van Tuyl, 224 F.2d 66 (7th Cir. 1955) 22n

Newman v. Shearson, Hammill & Co., Inc.,
383 F.Supp. 265 (W.D. Tex. 1974) 7n

Pawgan v. Silverstein, 265 F.Supp. 898
(S.D.N.Y. 1967) 7n

Proctor & Gamble Defense Corp. v. Bean,
146 F.2d 598 (5th Cir. 1945) 22n

Prudential Petroleum Corp. v. Rauscher, Pierce & Co., Inc.,
281 S.W.2d 457 (Tex. Civ. App. 1955) writ ref'd n.r.e. 15

Reader v. Hirsch & Co., 197 F.Supp. 111
(S.D.N.Y. 1961) 7n

Sam Reisfeld & Son Import Company v. S. A. Eteco,
530 F.2d 679 (5th Cir. 1976) 8, 11

Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614
(Tex. Civ. App. 1959) writ ref'd n.r.e. 14, 15

Shapiro v. Jaslow, 320 F.Supp. 598 (S.D.N.Y. 1970) 7, 7n, 13

Sibley v. Tandy Corporation, 543 F.2d 540
(5th Cir. 1976) 1, 6, 8, 10, 12, 22n

Starkman v. Seroussi, 377 F.Supp. 518
(S.D.N.Y. 1974) 7n

Stockwell v. Reynolds & Co., 252 F.Supp. 215
(S.D.N.Y. 1965) 8, 9, 13

Tcherepnin v. Knight, 389 U.S. 332 (1967) 19

Wilko v. Swan, 346 U.S. 427 (1953) 7n, 20, 21, 22-23, 23

Statutes

	Page
9 U.S.C. §3	2, 7n, 13, 22-23
15 U.S.C. §77n	7n
15 U.S.C. §78cc(a)	2, 4, 7n, 13, 22-23
15 U.S.C. §78j	3
28 U.S.C. §1254(1)	2
28 U.S.C. §1291	4, 12n
28 U.S.C. §1292(b)	4, 12n

In the

Supreme Court of the United States

OCTOBER TERM, 1977

No._____

HARPER SIBLEY, JR.,

Petitioner

v.

TANDY CORPORATION, ET AL.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Harper Sibley, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 3, 1976 and on February 18, 1977.

OPINIONS BELOW

The principal opinion of the Court of Appeals is reported at 543 F.2d 540 (5th Cir. 1976); it also appears in the appendix hereto, as does the opinion denying rehearing, which is not reported. The opinion of the District Court denying respondent's arbitration motion is also included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1976. A timely petition for rehearing was denied,

with opinion, on February 18, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals establishes an unworkable and potentially wasteful standard for determining the arbitrability of disputes involving both arbitrable and nonarbitrable issues?

2. Whether the decision of the Court of Appeals improperly reconciles the federal policy favoring arbitration with that precluding a contractual waiver of the right to litigate securities fraud claims?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15:

§78cc(a). Validity of Contracts

> Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

United States Code, Title 9:

§3. Stay of Proceedings Where Issue Therein Referable to Arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

STATEMENT OF THE CASE

Petitioner Harper Sibley, Jr., on his own behalf and as the contractually-stipulated representative of the former shareholders of P. J. Parker, Inc., obtained a favorable jury verdict against respondent Tandy Corporation for securities fraud in violation of §10(b) of the Exchange Act, 15 U.S.C. §78j, and Rule 10b-5 promulgated thereunder[1]; this verdict also vindicated petitioner's state-law claims of fraud, conversion, and specific performance of a contract. (A. 9-60, 90-100)

Petitioner's complaint, filed June 12, 1973, derived from respondent's June 4, 1971 acquisition of P. J. Parker, Inc. and its wholly-owned subsidiary, Hickok Manufacturing Company. Through Sibley, the former P. J. Parker, Inc. shareholders sought actual and punitive damages for respondent's fraudulent scheme to obtain P. J. Parker, Inc. and Hickok for two-thirds of the represented price, a scheme culminating in respondent's conversion of 33,281 shares of Tandy common stock held in escrow pending the completion of an acquisition audit.[2]

In its answer, respondent denied petitioner's allegations and counterclaimed for the escrowed shares, charging that petitioner had breached the acquisition agreement. (R. 54-76) Relying upon an arbitration provision in the same agreement, respondent simultaneously (A. 2) moved for arbitration of the non-fraud issues and a stay of that part of the court proceedings not

---

[1]Jurisdiction was further based on diversity, petitioner being a citizen of Florida and respondent being a Delaware corporation with its principal place of business in Texas.

[2]Fort Worth National Bank, a defendant in the trial court, is merely a stakeholder for petitioner and respondent; Fort Worth National Bank holds the escrowed Tandy stock as escrow agent and has not participated in this litigation.

involving any such issues, which respondent conceded were not arbitrable. (A. 63, 68) The trial court denied respondent's motion on the ground that the nonarbitrable issues were "so intertwined" with the arbitrable issues that to submit any part of the dispute to arbitration "would be to violate the mandate" of §29(a) of the Exchange Act, 15 U.S.C. §78cc(a) (A. 91), which renders void antecedent agreements to arbitrate claimed violations of the Exchange Act, like those alleged herein by petitioner. Respondent neither appealed that ruling under 28 U.S.C. §1291 nor asked the trial court to certify its ruling for interlocutory review under 28 U.S.C. §1292(b), and the parties thereupon proceeded with discovery and eventually a 10-day jury trial (October 21-November 1, 1974).

This dispute has always turned upon what petitioner contends was a variance between respondent's preacquisition representations and its postacquisition conduct. 33,281 shares of Tandy stock, one-third of the represented purchase price to be paid to P. J. Parker, Inc., were held in escrow pending an audit of the June 30, 1971 financial statements of P. J. Parker, Inc. by respondent's accountants; the purpose of the audit was to verify that those financials met a net-worth warranty that was part of the acquisition agreement. If the audited net worth were to fall below that warranted figure, the agreement provided that respondent would be entitled to retrieve $1.96 of its stock (at an agreed value) from the escrow account for every $1.00 of net-worth deficit. (A. 1984, 1769)

Petitioner has claimed that respondent fraudulently induced the execution of the acquisition agreement by the shareholders and schemed to prepare financial statements of

P. J. Parker, Inc. that would show an audited net worth less than the warranted figure, thereby giving rise to the appearance of a breach of contract by petitioner and ostensibly permitting respondent to recover the escrowed stock. Petitioner's trial pleadings further contended that this scheme was advanced by three critical preclosing misrepresentations by respondent as to the manner in which the net-worth verification would proceed: (1) inventory pricing would correspond with the pricing practices of P. J. Parker, Inc., as reflected in the December 31, 1970 certified Parker financial statements; (2) certain P. J. Parker, Inc. expenditures for computer software (referred to as the "Touchette" account) would be capitalized, and would not be subtracted from net worth; and (3) the 1971 calendar-year accruals for annually-recurring payments for taxes, fringe benefits, insurance and vacation pay would only be prorated for the 1971 calendar year. (A. 93 — Amended Complaint) Finally, petitioner's trial pleadings alleged that respondent acted with malice and in bad faith in causing the impoundment of the escrowed stock. (A. 93) This act, petitioner contends, consummated the fraud and gave rise to a conversion of the escrowed stock by respondent.

The jury trial resulted in answers to special interrogatories favorable to petitioner (A. 145-153) after 10 days of testimony from 22 witnesses and the introduction of more than 100 documentary exhibits. In particular, the jury found that each of the three misrepresentations had been made (A. 145; special issue 11) with no intention of fulfillment (A. 149; special issues 12-13), that each was material (A. 150; special issues 14-15), and that each was relied upon (A. 150; special issues 16-17).

The jury also vindicated petitioner's claim of malicious and bad faith impoundment (A. 147: special issues 9-10A), and awarded $3,000,000 in exemplary damages (A. 147: special issue 10A).

The trial court awarded judgment to petitioner of $463,853.93 in actual damages, plus delivery of the 33,281 escrowed Tandy shares. Petitioner appealed the trial court's denial of exemplary damages and its erroneous measure of actual damages, and respondent cross-appealed on liability and arbitrability. Without reaching the merits, the Fifth Circuit reversed and remanded because it viewed petitioner's arbitrable and nonarbitrable claims as "dependent" and only "to some degree intertwined and overlapping," 543 F.2d at 544 rather than being "so intertwined" as to preclude arbitration. The remand order was that trial of petitioner's fraud claims should be stayed pending arbitration of unspecified "contractual disputes." 543 F.2d at 544.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW ESTABLISHES AN UNWORKABLE AND POTENTIALLY WASTEFUL STANDARD FOR DETERMINING ARBITRABILITY OF DISPUTES INVOLVING BOTH ARBITRABLE AND NONARBITRABLE ISSUES.

A. The law before and after the opinion below.

This controversy involves federal securities fraud issues as

well as issues of breach of contract, common law fraud and conversion.

Until now, the law has been clear that federal securities fraud claims are not arbitrable,[3] while nonsecurities fraud claims are arbitrable, and that suits which include both types of issues are not arbitrable, in whole or in part, if those issues are "impractical, if not impossible" to separate. *Shapiro v. Jaslow*, 320 F.Supp. 598, 600 (S.D.N.Y. 1970).

Until now, when a trial court has been confronted with mixed arbitrable and nonarbitrable issues, the *Shapiro* test has necessitated an inquiry into the underlying question of whether any of the same facts affect both the arbitrable and the nonarbitrable legal theories with the result that a dispute must be tried in its entirety and not arbitrated, if the arbitrator charged with deciding

[3]Section 29(a) of the Exchange Act, 15 U.S.C. §78cc(a), voids any contractual condition requiring a party to a securities transaction to waive compliance with any other provision of that Act. This Court has interpreted §14 of the Securities Act (15 U.S.C. §77n), the counterpart of §29(a) of the Exchange Act, to prohibit enforcement of an agreement to arbitrate a claimed violation of the Securities Act. *Wilko v. Swan*, 346 U.S. 427 (1953). Other courts have reasoned that §29(a) of the Exchange Act and the logic of *Wilko* similarly prohibit arbitration of alleged violations of the antifraud provisions of the Exchange Act. *Ayres v. Merrill Lynch, Pierce, Fenner & Smith*, 538 F.2d 532, 536-37 (3d Cir. 1976), *cert. denied*, —— U.S. ——; *Colonial Realty Corp. v. Bache & Co.* 358 F.2d 178, 183, n. 5 (2d Cir. 1966); *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 245 (3rd Cir. 1968); *Newman v. Shearson Hammill & Co., Inc.*, 383 F.Supp. 265 (W.D. Tex. 1974); *Starkman v. Seroussi*, 377 F.Supp. 518 (S.D.N.Y. 1974); *Danford v. Schwabacher*, 342 F.Supp. 65 (N.D. Ca. 1972); *Pawgan v. Silverstein*, 265 F.Supp. 898 (S.D.N.Y. 1967); *Shapiro v. Jaslow*, 320 F.Supp. 598 (S.D.N.Y. 1970); *Maheu v. Reynolds & Co.*, 282 F.Supp. 423 (S.D.N.Y. 1968); *Reader v. Hirsch & Co.*, 197 F.Supp. 111 (S.D.N.Y. 1961).

Section 3 of the Federal Arbitration Act requires a stay of litigation "if the issue [sic] involved in such suit is referable to arbitration under [an] agreement" between the litigants. 9 U.S.C. §3. This statute wrongly assumes that all disputes consist of a single issue which is either arbitrable or nonarbitrable.

the arbitrable non-fraud questions would have to deal with many of the same facts as would the court charged with deciding the federal securities fraud questions. *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965). Such a test was applied by the trial court in the instant case. (A. 84-86)

Until now, it was settled that determinations of arbitrability were within the trial court's sound discretion. *Collins Radio Company v. Ex-Cell-O Corporation*, 467 F.2d 995, 1000 (8th Cir. 1972); *Sam Reisfeld & Son Import Company v. S. A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976).

Now, the opinion of the Fifth Circuit has upset this relatively stable state of the law by fashioning two unprecedented rulings. First, the Fifth Circuit has rejected the notion of deferential treatment of trial court determinations of arbitrability, in favor of a completely *de novo* appellate determination, notwithstanding the passage of literally years of litigation and full resolution of the merits of the controversy by jury trial. In addition, the Fifth Circuit has superimposed upon the *Shapiro* test an inscrutable requirement that a dispute be deemed (i) wholly nonarbitrable if the arbitrable and nonarbitrable issues are "intertwined in the legal sense" (543 F.2d at 543), but (ii) partly arbitrable if those issues "are [only] to some degree intertwined and overlapping" or "dependent" (543 F.2d at 543-544).

The impact of these errors is profound. Situations abound in which arbitrable claims are joined with nonarbitrable claims and in which contractual arbitration clauses are involved. See, *e.g.*, *Frier Industries, Inc. v. Glickman*, ¶94,845 Fed. Sec. L. Rep. [1974-75 Transfer Binder] (S.D.N.Y. 1974); *Macchiarelli v. Shearson, Hammill & Co., Inc.*, 384 F.Supp 21,

30 (E.D. Ca. 1974); *Stockwell v. Reynolds*, *supra*. With the widespread use of form agreements containing arbitration clauses in the brokerage industry, it is predictable that arbitrable and nonarbitrable claims will continued to be joined — frequently. And it is not at all unreasonable to suppose that many commercial transactions involving securities (acquisitions, mergers, compensation programs, etc.) and providing for arbitration of disputes will eventually present both arbitrable questions and questions of securities fraud. In all such cases, a clear, predictable and workable standard for deciding (and for reviewing the decision of) arbitrability issues is absolutely critical to the reconciliation of the aims of both the anti-waiver provisions of the securities fraud statutes and the arbitration statute.[4] A standard which is so unclear as always to require appellate review, or which in virtually every instance is to be applied *de novo* on appeal, will necessarily have one of two failings: either it will fail to keep claims out of the courts and thereby fail to achieve the economies thought to flow from arbitration, or it will discourage the use of arbitration clauses and thereby relegate all disputes to judicial resolution.

---

[4]The instant decision has an impact far broader even than the securities world. Another type of nonarbitrable claim is one arising under the antitrust laws of the United States. See *Aimcee Wholesale Corp. v. Tomar Products, Inc.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968 (1968); *American Safety Equipment Corp. v. J. P. Maguire and Co. v. Hickok Mfg. Co., Inc.*, 391 F.2d 821 (2d Cir. 1968); *A. & E. Plastik Pak Co., Inc. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968). District Courts in the Fifth Circuit will be compelled to apply the decision in the case *sub judice* to disputes mixing antitrust claims and arbitrable claims, and will undoubtedly find themselves equally perplexed and second guessed in doing so.

B. The distinction between "legal intertwinement" and "somewhat intertwined."

The new Fifth Circuit policy — *de novo* appellate determinations of whether arbitrable and nonarbitrable issues are "legally intertwined" (nonarbitrable), or merely "to some degree intertwined and overlapping" (arbitrable) — is, of course, without substance. The test has no real value either for practitioners or trial courts who must, respectively, advise clients and rule regarding whether to arbitrate, at the risk of finding their judgments overturned after years of extensive discovery and litigation.

All the more deleterious are the effects of the Fifth Circuit's "test" when considered in light of its additional holding — an interlocutory appeal from an order denying a motion to stay pending arbitration is neither appropriate nor required.[5] 543 F.2d at 542. Without a relatively quick determination that arbitration is required, the economies of time and money in the arbitration process become as they are in this case — non-existent. On the other hand, to require arbitration when, in fact, the anti-waiver provisions of the federal securities laws would preserve the right to trial is eventually to require at least two proceedings when only one is either necessary or appropriate.[6] Something more than appellate sorcery must be

[5]Should this Court issue its writ this issue of appealability of orders staying (or not staying) litigation pending arbitration begs for clarification, especially in view of the Fifth Circuit's insistence upon a *de novo* determination of the question.

[6]By virtue of the Fifth Circuit's opinion, there is a possibility of at least three proceedings: the original trial, the arbitration now required, and a trial of the federal securities and common law fraud claims after arbitration. By any rational assessment, such a result is absurd.

relied upon to resolve with efficiency the vast number of questions of arbitrability arising from disputes including both arbitrable and nonarbitrable issues; the Fifth Circuit's distinction between "legal intertwinement" and "somewhat intertwined" is no help to the trial courts which must make these ever-so-critical arbitrability determinations. Rather, any fair reading of the Fifth Circuit opinion reveals more propensity to turn a quotable phrase than to analyze, as did the trial court, the question of whether the arbitrator and the court would be reviewing the same evidence. (See pp. 13-19, *infra*)

C. *De novo* determination by the appellate court.

But even the untenable distinction made by the Fifth Circuit would not be so harmful if the appellate court did not also hold itself out as the sole arbiter of the issue. The Fifth Circuit failed to find that the trial court had abused its discretion in deciding to try the case — even while citing a number of cases illustrating the discretionary prerogative of the trial court in this area. *Frier Industries Inc. v. Glickman*, ¶94,845 Fed. Sec. L. Rep. [1974-75 Transfer Binder] (S.D.N.Y. 1974), *supra; Macchiavelli v. Shearson, Hammill & Co., Inc.*, 384 F.Supp. 21, *supra; Sam Reisfeld & Son Import Co. v. S. A. Eteco*, 530 F.2d 679, *supra.*

There are several practical advantages to be gained from giving the trial court discretion in making the difficult choice between arbitration and trial in cases involving both securities fraud and nonarbitrable issues. In the first place, the trial judge can decide this question at any of a number of times (utilizing pleadings, amended pleadings, hearings and whatever discovery the record contains) that will still permit realization of the

economies of arbitration.[7] Secondly, for an appellate court to arrogate the right to review *de novo* what the trial court decided years before and reverse and remand for arbitration after a full trial on merits reveals an attachment for arbitration not *because of* "considerations of judicial economy" (543 F.2d at 544) but rather *irrespective of* any such considerations. Finally, no possible advantage derives from making the parties proceed (either with litigation or arbitration) under the cloud of *de novo* review. If the appellate court is to be free to make the determination afresh (and on a completely inscrutable standard) then the appellate court should decide the issue before either litigation or arbitration is advanced.[8] To let stand the uncertainty created by the decision below is to guarantee but one unfortunate result: no practitioner in his right mind will let his client enter into an agreement providing for arbitration where there exists even the remote chance of becoming embroiled in years of litigation, including certain appellate review, just on the question of which forum should be used.

---

[7]One pitfall of the *de novo* approach is illustrated by the appellate court's failure to understand the issues as well as the trial judge. The principal opinion of the Fifth Circuit assumed that respondent had "by a timely motion" moved to stay all court proceedings pending arbitration. In fact, Tandy's motion did not ask to stay trial of fraud issues, but only to arbitrate the so-called non-fraud issues. (A.63) On petition for rehearing, the Court of Appeals disingenuously covered its tracks, if you will, by holding that — an unheralded prayer in a reply brief was an acceptable substitute for a wholesale motion to stay — contrary, we might add, to the requirements of Rule 7(b)(1) of the Federal Rules of Civil Procedure.

[8]The absence of any requirement for interlocutory appeal is perhaps the most dangerously wasteful aspect of *de novo* review after trial (or after arbitration). See n. 5, *supra*, and accompanying text. It encourages the party seeking arbitration to forego all attempts at interlocutory review (under either §1291 or §1292(b) of Title 28), for it provides such parties with the luxury of a possible free look at a jury verdict — which can be overturned by a quick stroke of an appellate court pen, sending the case to arbitration.

This Court should reaffirm the rule of *Shapiro v. Jaslow* and *Stockwell v. Reynolds*, and the duty of the trial court to analyze, as did the trial court here, the degree to which overlapping legal and factual disputes will be decided in a trial (or by an arbitrator). This analysis must enjoy a presumption of validity, subject to reversal for abuse of discretion. It must not be subject to facile reversal by an appellate court perceiving itself capable of distinguishing between "legal intertwinement" and "somewhat intertwined."

D. Application of the *Shapiro* and *Stockwell* rules.

While citing the *Shapiro* and *Stockwell* cases, the Court of Appeals completely misapplied them, and in doing so satisfied neither the ends of §29(a) of the Exchange Act nor those of §3 of the Federal Arbitration Act. Apparently proceeding on the assumption that all facts bear labels such as "fraud," or "contract," or "conversion," the Fifth Circuit implicitly concluded that arbitration will not require the arbitrator to hear any of the evidence which previously persuaded a jury that in converting the escrowed stock, respondent worked a fraud on the shareholders of P. J. Parker, Inc. Nothing in either appellate opinion undertakes to segregate this evidence; the parties have not received even a hint as to what facts, if any, must be withheld from the arbitrator because they are "fraud" facts.

There is an obvious explanation for the Fifth Circuit's silence on this matter: the "fraud" facts, the "contract" facts and the "conversion" facts are one and the same. A few illustrations make the point:

1. *Inventory Pricing*. The jury found that respondent had represented that the acquisition audit would price inventory at June 30, 1971, by the same methods as had been used in the December 31, 1970 audit. (A. 148; issue 11(a)) This finding

was essential to petitioner's fraud case, because the representation was plainly false. (Issues 1, 24 and 25; A. 323-324, 487-488, 508-510, 792, 794, 823, 960, 991, 1291, 1293)

The jury also found, however, that the agreement did not permit the massive inventory writedown[9] taken by respondent, and that the acquisition audit therefore improperly priced inventory. (A. 145, 153; issues 1, 24 and 25)

All these findings (issues 1, 11(a), 24 and 25) established that respondent's contract counterclaim (to capture the escrowed stock) was untenable, because it was in part based on the inventory writedown, and that respondent's impoundment of the escrowed stock was a conversion. [See *Sandor Petroleum Corp. v. Williams*, 321 S.W.2d 614 (Tex.Civ.App. 1959) writ ref'd n.r.e., holding that a conversion arises from a wrongful interference with another's property, even where that interference is based on a claimed contractual right that is later proven invalid.] The same evidence supported all these findings. (A. 312-313, 317-319, 323-324, 335-336, 369-370, 431-432, 536, 702, 708-714, 736, 761, 1132, 1352-53, 1367)

An arbitrator will necessarily hear this evidence, just as a court and jury already have.

2. *Touchette*. The jury found that the respondent represented that costs[10] associated with a purchase of computer software from a company called "Touchette" would not be subtracted from the net worth of P. J. Parker, Inc. for purposes of the acquisition audit. (A. 148; issue 11(b)) This finding was part of and essential to petitioner's fraud verdict, because the repre-

[9] $331,492 (PX 18; A. 1849).

[10] $93,721 (A. 384, 499-502, 1879).

sentation was undisputedly false. (PX 18; A. 1842, 384)

A similar jury finding undermined respondent's claim that it was entitled to charge the Touchette expenses against Parker's net worth, as it did. (A. 146-47; issue 7)

Both these findings (issues 7 and 11(b)) served (i) to repudiate respondent's counterclaim for breach of contract, because it was in part based on subtracting the Touchette expenses from net worth, and (ii) to establish petitioner's claim of conversion — if respondent had no contractual right to the escrowed stock, the impoundment was a conversion. See *Sandor v. Williams*, *supra*, and *Prudential Petroleum Corp. v. Rauscher, Pierce & Co., Inc.*, 281 S.W.2d 457 (Tex.Civ.App. 1955) writ ref'd n.r.e. The same evidence supported both findings. (A. 308-310, 312, 499-502, 714-715, 1879)

An arbitrator will necessarily hear this evidence, just as a court and jury already have.

3. *Insurance and Vacation Pay*. The jury found that respondent represented that in accordance with past Parker practice, these annually recurring expenses (for union employee life and hospitalization insurance and management vacations) would only be prorated for the 1971 calendar year in preparation of the June 30, 1971 audit. (A. 148; issues 11(c) and 11(d)) Those findings were essential to and part of petitioner's fraud verdict, because the representations were false. (The acquisition audit charged $486,016 and $65,000 to net worth for insurance (A. 1260) and vacation pay (A. 1842), respectively, even though past practice had been a $12,000 annual charge for insurance (A. 1208-1209, 555-556) and no accrual for vacation pay (A. 1045, 1465).

The jury also found that the acquisition audit departed from the parties' agreement in its treatment of insurance and vacation pay. (Issues 3-6, 20, 22, 23; A. 145-146, 151-153)

All these findings undermined respondent's contract counterclaim, which was based, in part, on charging Parker's net worth with these unfounded insurance and vacation pay accruals, and validated petitioner's claim of conversion. The same evidence supported all these findings. (A. 369-371, 385, 553, 555-56, 561, 702-703, 716-717, 763, 1132, 1045, 1208-09, 1438-39, 1465-67, 1478, 1495-97, 1546-47).

An arbitrator will necessarily hear all this evidence, just as a court and jury already have.

4. *False Inventory Certificate.* In order to get its accountants (Price Waterhouse & Co.) to give a clean opinion with respect to the inventory valuation on the Parker financials prepared for audit by respondent, respondent delivered to Price Waterhouse a document which respondent described as proof of the fact that it had correctly valued the Parker inventory, in accordance with past Parker pricing practices. (PX 41) Without such a document Price Waterhouse would never have issued its audit, certifying that the inventory valuation was correct (A. 1398-1401), and the inventory-deficiency portion of Tandy's counterclaim would have failed.

This document was proven at trial to have been completely phony — fraudulent, if you will. (A. 1000, 969-970, 868-869, 808, 956-958, 1210-1212) Proof that this document was born in sin was part of petitioner's proof of fraud — it helped establish Tandy's scienter; it also disproved Tandy's contract counterclaim, which was based, in part, on what Tandy claimed was a net-worth deficit arising out of an inventory overvaluation; and it virtually assured the jury finding that the conversion (impoundment) was done with malice and in bad faith. The evidence that proved the unreliability of this document was offered both in support of petitioner's fraud theory and in opposition to respondent's contract counterclaim.

An arbitrator will necessarily hear this evidence, just as a court and jury already have.

5. *Offer to Buy Inventory.* After the acquisition agreement had closed and respondent had begun the systematic process of writing down the value of the Parker inventory, disregarding the pre-closing representations, Patrick J. Parker, the president of P. J. Parker, Inc., offered to buy all the marked-down inventory at a price that would prevent there from being any net-worth deficiency attributable to inventory. (A. 335-336, 431-432, 1352-1353) Respondent rejected that offer, and insisted on its write-down, to maintain its claim to the escrowed stock. (A. 335-336) That evidence was undisputed. It proved fraud (scienter), it disproved respondent's claim that Parker had breached the net worth warranty, and it therefore demonstrated that the impoundment was an act of conversion.

The evidence establishing this offer and rejection has already been heard by a judge and jury, but as things stand now, an arbitrator will have to hear it again.

6. *Impoundment.* The act which damaged petitioner was respondent's letter to the escrow agent impounding the escrowed stock (PX 38; A. 1982). That letter was written six months *before* Price Waterhouse had delivered its opinion; it was written at a time when the only draft of the Price Waterhouse report (PX 29) — a draft never disclosed to petitioner and obtained only through discovery — showed petitioner to be entitled to

all the escrowed stock[11]; it was written *after* respondent had rejected the offer to buy the allegedly overvalued inventory at book value (A. 335-336); it was written at a time when respondent was selling Parker's inventory at prices *exceeding* the marked-down figures which respondent had insisted upon (A. 997); it was written after respondent had fired Pat Parker for his refusal to accept a "compromise" valuation of inventory (A. 333-334, 337, 340, 1380); it claimed as Parker liabilities management insurance benefits which respondent had *terminated* after the closing (A. 1214, 1982, 1998; PX 38); it further claimed as liabilities certain life and hospitalization insurance benefits as to which respondent had then received (but not disclosed) two legal opinions stating that these liabilities would terminate with the imminent expiration of the union contracts providing them (PX 44; DX 56; A. 1118-1119, 1996, 2066, 1217); and it was written at a time when respondent had been advised by Price Waterhouse that generally accepted accounting principles did not require accrual of either management vacation pay or life and hospitalization insurance for union employees (PX 29 [paragraph 2, p. 2]; A. 1893).

Based on these facts, the jury found that respondent had acted in bad faith and with malice in impounding the stock, and awarded $3,000,000 in exemplary damages (Issues 9-10A; A. 147).

The act of impoundment was the act which both consummated

[11]Net worth, per PX 29, was $1,940,000, only $17,000 less than the warranty figure; the $93,000 Touchette expenditure had been subtracted from net worth in arriving at the $1,940,000 total; adding that sum back (in accordance with respondent's representation, as confirmed by the accountants — A. 1879, 499-502) there would have been no breach of warranty.

the fraud and converted petitioner's stock. The jury had heard the evidence proving the maliciousness of this tort. An arbitrator will, too — because petitioner's conversion claim is presumably arbitrable, even though it is inseparable from petitioner's fraud claim.

The waste of what lies ahead is evident. The ends of public and private economy and prompt resolution of controversies, so often described as the primary advantages of arbitration, are hardly advanced by the decision below — not in this case, of course, nor in any other. In *this* case, an arbitrator will hear facts on which a jury verdict of fraud has already been handed down; and petitioner will be required to prove twice, if not three times, what he has already proved once — that respondent's claim to the escrowed stock was and is knowingly groundless. In all *subsequent* cases, this decision will first baffle trial courts and lawyers alike, then hang like a deadly pall over whatever decisions are initially made. Petitioner deserves a better holding, and trial courts, lawyers, and businessmen considering arbitration agreements — justice — deserves a better opinion. The decision below is wasteful, inscrutable, unpredictable and unfair. It should be reversed.

2. THE DECISION BELOW IMPROPERLY RECONCILES THE FEDERAL POLICY FAVORING ARBITRATION WITH THAT PRECLUDING WAIVER OF THE RIGHT TO LITIGATE CLAIMS OF SECURITIES FRAUD.

The cases favoring remedial application of the federal securities laws are at least as numerous and as authoritative as those favoring arbitration. Compare *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) with *Galt v. Libbey-Owens-Ford Glass*

Co., 376 F.2d 711, 714 (7th Cir. 1967). The instant case and others like it present an undeniable tension between the two policies. This Court has established the proper accommodation:

> Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.

Wilko v. Swan, 346 U.S. 427, 438 (1953). Based on this holding, the Third Circuit recently observed that "the existence of countervailing federal policies . . . makes cases showing an hospitable judicial attitude to the construction of arbitration clauses inapposite." *Ayres v. Merrill Lynch*, 538 F.2d at 536, n. 9, *supra*.

The decision below conflicts with these principles. Ten days of trial involving 22 witnesses, over 100 documentary exhibits, and careful consideration by a jury, plus extraordinarily expensive merits-briefing on appeal and no less than four years of litigation — all is to be wasted in the interest of a "prompt economical and adequate solution" that is no longer possible — and never was possible without the benefit of discovery afforded by judicial procedures. We ask this Court to recall its own view of the relative disadvantages of arbitration:

> [T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as *discovery*, compulsory process, cross-examination, and testimony under oath, are often *severely limited or unavailable*.

Alexander v. Gardner-Denver Company, 415 U.S. 36, 57-58 (1974) (emphasis supplied). Many of the indicia of fraud in this case were the product of discovery. To give but a few examples: petitioner discovered PX 32 (a memorandum revealing respondent's pre-closing plan to write down the value of the Parker inventory (A. 1926), PX 41 (a fraudulent inventory certificate — see pp. 16-17, *supra*), and PX 29 (a draft of the Price Waterhouse audit report showing petitioner to be entitled to all the escrowed Tandy stock — see n. 11, *supra*, and accompanying text) well after filing the lawsuit. These and other discoveries resulted in an amended complaint in which petitioner's claim of fraud was pled with unmistakable independence.

The Court of Appeals would have had petitioner proceed straight to arbitration and forego his right to discover, and, to a large extent, prove the extent of the fraud visited upon him. It was no doubt to avoid the unfairness of results of this nature that this Court rendered its *Wilko* and *Alexander* rulings, and that the formerly prevailing rule was to deny arbitration when arbitrable and nonarbitrable claims were joined in such a way that some of the same facts formed the basis of both. The decision below ignores these considerations. Its result therefore conflicts with the spirit of *Wilko* and its progeny, and it should be reversed.

There is more than irony here. This is fundamentally unfair. Based on petitioner's original complaint,[12] neither *Wilko v Swan*

[12]The Fifth Circuit's arbitration order asserts that petitioner's 10b-5 claim is necessarily "dependent" upon his having lost the dispute (raised by respondent's counterclaim and by petitioner's claim for specific performance) concerning what the acquisition agreement meant. 543 F.2d at 543. This "dependency" notion was grounded upon the Fifth Circuit's analysis of "the claims made in the original complaint." *Id.*

The original complaint did couch one (but only one) part of petitioner's fraud claims in terms of an alternative theory of recovery — those in Count IV (A. 14-15); those in Count VI were also non-arbitrable, but were never pleaded as being "dependent" upon any other contentions, something which the Court of Appeals overlooked. But when discovery revealed the pervasiveness of respondent's fraud (see p. 21, *supra*), petitioner amended the complaint to charge respondent with fraud "whether or not" petitioner prevailed on the dispute over the meaning of the contract. (A. 97) The amended complaint plainly stated the independent viability of petitioner's securities fraud allegations. Petitioner went to trial on the amended complaint, and proved that quite apart from the quarrel over the meaning of the acquisition agreement, respondent had committed a serious fraud, begun with representations inducing Parker to agree to be acquired (A. 148-158; special issues 11-17), followed by a systematic failure to perform each such promise, and consummated by a malicious and knowingly unfounded impoundment of the escrowed Tandy stock. (A. 147; special issues 9-10)

The law is settled that an appellate court should only examine the most recent amended complaint in reviewing the decisions of the district court, for the amended complaint supersedes and renders "non-existent" the original complaint. *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967); *Lubin v. Chicago Title and Trust Company*, 260 F.2d 411, 413 (7th Cir. 1958); *Nisbet v. Van Tuyl*, 224 F.2d 66, 71 (7th Cir. 1955); *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945); *Bullen v. DeBretteville*, 239 F.2d 824 (9th Cir. 1956); *cert. denied* 353 U.S. 947; *Borel v. United States Cas. Co.*, 233 F.2d 385, 388 (5th Cir. 1956) [superseded pleading cannot be used as a legal admission]. Zeroing in on the original complaint, the Fifth Circuit here treated petitioner's alternative pleading of fraud as a legal admission that petitioner's fraud claims were legally "dependent" on petitioner's losing the contract quarrel. This focus on the original complaint was error; that complaint was amended in the one respect which the Court of Appeals here found so important, and to ignore that amendment was not only to err, but to create a conflict with (i) the foregoing decisions of other circuits, and (ii) prior decisions of the Fifth Circuit itself.

nor §29(a) of the Exchange Act means anything if a proven case of fraud in violation of Rule 10b-5 can be tossed out on the strength of a contractual arbitration clause and §3 of the Federal Arbitration Act.

CONCLUSION

The decision below did not reach the merits. It ignored the fact that petitioner has proven fraud under the federal securities laws, and ordered arbitration of a dispute already fully litigated. It disregarded the fact that an arbitrator will have to hear the same facts as have already persuaded a jury to find fraud, and as may be heard by yet a third dispute-solving body. It deprived the trial court of discretion in deciding whether a dispute should be arbitrated or tried, and it did so by adopting a policy of *de novo* review of such decisions. It permitted respondent the unprecedented luxury of a free look at a jury verdict, without even requiring an *attempt* to get interlocutory review of the arbitration question. It left the law of arbitrability in a state of hopeless confusion. It based its holding on a superseded pleading. It repudiated the underlying premise of this Court's decision in *Wilko v. Swan*, and, worst of all, it reached a result that is enormously wasteful and unfair — to petitioner, to the trial court, and to all other lawyers and trial judges who must try now to guess which forum the appellate court will ultimately prefer.

For all these reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment and opinions of the Fifth Circuit.

Respectfully submitted,
MARVIN S. SLOMAN
ROBERT L. BLUMENTHAL
EARL F. HALE JR.
ROD PHELAN
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Marvin S. Sloman, counsel for Harper Sibley, Jr., petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on May 19, 1977, I served three copies of the foregoing Petition for Writ of Certiorari on respondent herein, by hand-delivering same to Warren W. Shipman III, at his office at 1800 Commerce Building, Ft. Worth, Texas, and to Cecil E. Munn, at his Office at 1800 First National Bank Building, Fort Worth, Texas.

MARVIN S. SLOMAN
3000 One Main Place
Dallas, Texas 75250
Counsel for Petitioner

APPENDIX

1. Opinion of the United States District Court for the Northern District of Texas, Dallas Division.

In the

United States District Court

For the Northern District of Texas
Dallas Division

HARPER SIBLEY, JR.
v.
TANDY CORPORATION, ET AL. } *Civil Action 3-7300-B*

MEMORANDUM OPINION AND ORDER

On June 12, 1973, plaintiff Harper Sibley, Jr., filed his six count complaint in the above styled and numbered cause seeking the release of certain escrowed stock, reformation of a merger agreement, money damages, and exemplary damages all arising out of the merger of P. J. Parker, Inc., with and into HTT, Inc., a wholly owned subsidiary of defendant Tandy Corporation.

Plaintiff asserts that this action arises under 15 U.S.C. 78j(b) (1970) (Section 10b of the Securities Exchange Act of 1934) and the rules promulgated thereunder with resulting pendent jurisdiction of the state common law and statutory claims. There is an additional allegation of diversity jurisdiction.

Defendant Tandy filed a Motion to Stay Proceedings on July 24, 1973, contending *inter alia* that the parties had agreed contractually to arbitrate any disputes arising out of the merger

and that arbitration agreement is enforceable under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.* (1970).

After a careful examination of the pleadings and the briefs submitted by counsel, the Court is of the opinion that arbitration would be inappropriate in this cause and, therefore, declines to enter an order that would stay the proceedings.

The Plan and Agreement of Merger executed by P. J. Parker, Inc. and HTT, Inc. is, a ". . . contract evidencing a transaction involving commerce . . ." that contains an arbitration agreement and comes, therefore, within the scope of the Federal Arbitration Act. 9 U.S.C. 2 (1970). "Once a dispute is covered by the Act, federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability." *Coenen v. R. W. Pressprich Co.*, 453 F.2d 1209, 1211 (2nd Cir.), *cert. den.* 406 U.S. 949 (1972). This is the accepted rule in both the federal judiciary and in the Texas judiciary. *See Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2nd Cir. 1972); *Collins Radio Co. v. Ex-Cell-O Corp.*, 467 F.2d 995, 998 (8th Cir. 1972; *Coenen v. R. W. Pressrich, supra; Hart v. Orlon Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971); *Boston & Maine Corp. v. Chicago, Burlington and Quincy R.R.*, 381 F.2d 365 (2nd Cir. 1967); *Lummas Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 86 n.4 (2nd Cir.) *cert. den.* 368 U.S. 986 1961); *Robert Lawrence Co. v. Devonshire Fabrics, Inv.*, 271 F.2d 402 (2nd Cir. 1959), *cert. granted* 362 U.S. 909 (1960), *cert. dismissed pursuant to stipulation of counsel* 364 U.S. 801 (1961); *Mamlin v. Susan Thomas, Inc.*, 490 S.W.2d 634 (Tex. Civ. App. 1973).

Plaintiff's complaint may be analysed as follows: (1) Count IV alleges a violation of rule 10b-5 of section 10b of the

Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1970): (2) Counts I, II, III, V and VI allege claims grounded in the contract of merger relating to defaults on the part of defendants or reformation of the merger agreement.

Counsel for both parties agree that section 29 of the Act, 15 U.S.C. 78cc (1970) precludes submission of Count IV of the Complaint to arbitration, *see Wilco v. Swan*, 346 U.S. 427 (1953); however, defendant argues for the severance and submission to arbitration of the remaining counts.

But Counts I, II, III, V and VI of the Complaint are so intertwined with the rule 10b-5 allegations in Count IV that to submit any of those counts to arbitration would be to violate the mandate of section 78cc of the Act. This is especially true when one considers that Counts I, II, III, V and VI involve intricate questions of law and findings of fact that, when rendered, would likely resolve the issues presented in Count IV.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Motion to Stay Proceedings filed in this cause by defendant Tandy is and the same is hereby DENIED.

SIGNED and ENTERED this 10 day of September, 1973.

SARAH T. HUGHES
United States District Judge

2. Principal Opinion of the United States Court of Appeals for the Fifth Circuit.

Harper SIBLEY, Jr., Plaintiff-Appellant, Cross Appellee,

v.

TANDY CORPORATION et al., Defendants,

Tandy Corporation, Defendant-Appellee, Cross Appellant.

No. 75-1243.

United States Court of Appeals,
Fifth Circuit.

Dec. 3, 1976.

Rehearing Denied Feb. 18, 1977.

Robert L. Blumenthal, Rod Phelan, Earl F. Hale, Jr., Dallas, Tex., for plaintiff-appellant, cross appellee.

Warren W. Shipman, III, Donald H. Ray, Charles L. Stephens, Cecil E. Munn, Sloan B. Blair, Fort Worth, Tex., for Tandy Corp.

R. F. Snakard, Fort Worth, Tex., for Ft. Worth Nat'l Bank.

Appeals from the United States District Court for the Northern District of Texas.

Before GEWIN, GODBOLD and SIMPSON, Circuit Judges.

GODBOLD, Circuit Judge:

This case originates from a corporate merger agreement containing a provision for arbitration of differences arising from the agreement. Differences arose between the parties to the agreement, and one party sued asserting breach of contract claims, federal and state securities law claims, and common law fraud claims. We hold that the district court erred in refusing to require arbitration of the contract claims and to stay the securities and fraud claims pending arbitration.

The merger agreement was between Tandy Corporation and P. J. Parker, Inc., a holding company. Parker's primary asset was ownership of Hickok Manufacturing Company. Hickok and Parker were experiencing serious financial difficulties. The management of Parker began negotiating with the Tandy management with the object of merging Parker into a specially-formed Tandy subsidiary. After several months of intense negotiations, Tandy and Parker entered into a written agreement calling for a statutory merger between Parker and a newly created Tandy subsidiary.

Parker shareholders were to be paid in Tandy stock, two thirds upon surrender of the Parker shares and the remaining third to be held by Fort Worth National Bank as escrow agent pending verification of Parker's representation of its net worth. Tandy was to obtain an audit by its accountants to confirm the Parker net worth. The audit and all other accounting matters were to "be handled in accordance with generally accepted accounting principles applied on a basis consistent with those applied with respect to the certified consolidated financial statements of Parker as of December 31, 1970." The agreement provided for arbitration of all disputes arising from the agreement.

According to the audit by Tandy's accountants, Parker's net worth was substantially less than represented. The primary reasons for the difference in figures were: (a) a write-down of $331,492 in the value of Hickok's inventory; (b) a charge of $93,721 against Parker's net worth, incurred as a result of Tandy's cancellation of a computer software contract held by Parker; (c) the inclusion of a liability of $486,016 for the cost of a single premium life and medical insurance policy to cover insurance benefits allegedly owed by Hickok to retired employees; and (d) the inclusion of a liability of $65,000 for accrued management vacation pay. After receiving the audit Tandy ordered the bank to impound the escrowed stock.

Harper Sibley, the person designated in the agreement as the representative of Parker shareholders, brought suit against Tandy. (For convenience we refer to the plaintiff as "Parker.") The original complaint was in six counts, characterized by the district court in this manner:

*** p. 542 ***

> Plaintiff's complaint may be analyzed as follows: (1) Count IV alleges a violation of rule 10b-5 of section 10b of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1970); (2) Counts I, II, III, V and VI allege claims grounded in the contract of merger relating to defaults on the part of defendants or reformation of the merger agreement.[1]

By a timely motion Tandy moved to have the contract claims submitted to arbitration and to have the federal securities law claims stayed pending arbitration. The parties and the district judge recognized that under § 29 of the Act, 15 U.S.C. § 78cc

[1]Perhaps, more accurately, there were four contract counts, one federal and one state securities law count, and one common law fraudulent misrepresentation count.

(1970), Count IV was not subject to arbitration. *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). The court declined, however, to sever the contract counts and to submit them to arbitration, on the ground that they were so intertwined with the securities law claim that submitting them to arbitration would violate § 78cc, saying:

> This is especially true when one considers that Counts I, II, III, V and VI involve intricate questions of law and findings of fact that when rendered, would likely resolve the issues presented in Count IV.

Trial was held in October 1974 and consumed 14 days, 22 witnesses and more than 100 documentary exhibits. The jury verdict consisted of answers to special interrogatories consisting of 34 specific questions.[2] The bulk of the interrogatories related to matters of accounting, i. e., the application of "generally accepted accounting procedures" and the interpretation of corporate financial statements, with particular reference to the four areas of primary controversy — valuation of inventory and inclusion as liabilities of a charge for cancellation of a computer software contract, life insurance premiums, and vacation pay. These were the areas from which arose the differences in valuation of Parker's net worth as represented by it and as reflected by Tandy's audit. Several interrogatories related to pre-agreement representations made by Tandy concerning accounting principles and the treatment of the four specific accounting items in particular controversy.

The court entered judgment awarding $463,853.93 damages to Parker plus delivery of the escrowed shares. Parker appealed on the issue of damages. Tandy cross-appealed on the issue of

[2]There was no general verdict.

liability and the refusal to submit to arbitration. We hold that the court erred when it denied Tandy's motion to submit the contract claims to arbitration and refused to stay the securities fraud claims pending the outcome of that arbitration. We, therefore, reach neither the issue of Tandy's liability nor the issue of damages.

We find no merit in plaintiff's contention that Tandy waived its right to arbitration. The burden on one seeking to prove a waiver of arbitration is a heavy one. *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (CA5, 1970); *Hilti, Inc. v. Oldach*, 392 F.2d 368 (CA1, 1968). The plaintiff has failed to carry this burden. Tandy filed its motion to stay the very day it filed its answer to Parker's complaint, and it took no actions which could be viewed as being inconsistent with its right of arbitration. Tandy did not waive its right by failing to press an interlocutory appeal of the district judge's denial of its motion to stay arbitration. *General Guaranty, supra.*

The present case squarely raises the problem of what a court should do where arbitrable claims are joined with claims not subject to arbitration. On the one hand, Section Two of the United States Arbitration Act, 9 U.S.C. § 2, makes arbitration clauses in contracts involving commerce "valid, irrevocable and enforceable." Parker's contract claims against Tandy fall *** p. 543 *** within the ambit of the arbitration clause of their agreement, and are thus arbitrable. Their subject matter is peculiarly adapted to arbitration. On the other hand, claims under the Federal Securities Acts, such as Parker's 10b–5 claim, are generally not subject to arbitration under a preexisting arbi-

tration clause. *Wilko v. Swan, supra; Neuman v. Shearson, Hammill & Co., Inc.* 383 F.Supp. 265 (W.D.Tex. 1974).[3]

Here, the district judge ordered all issues tried on the ground that the arbitrable issues were inextricably intertwined with the federally cognizable 10b–5 issues. We agree with the district judge that when it is impractical if not impossible to separate out non-arbitable federal securities law claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims. *Shapiro v. Jaslow,* 320 F.Supp. 598 (S.D.N.Y.1970). However, in this case, the claims were not "intertwined" in the legal sense. Instead we view the 10b–5 claim as being "dependent" upon the contract claims. The difference is subtle yet significant. A comparison of the claims in *Shapiro v. Jaslow, supra,* with Parker's claims illustrates the difference. In *Shapiro,* one of the defendants alleged in a cross-complaint that one of his codefendants committed acts giving rise to rights under both the common law (arbitrable) and under the federal securities law (non-arbitrable). The two claims in *Shapiro* were not factually severable. An arbitrator making a decision on the common law claims would have been

---

[3]While there is language in *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), which suggests a colorable argument that the doctrine of *Wilko v. Swan, supra,* does not apply to actions brought under the 1934 Securities Exchange Act, we adhere to the view that the similarities between the 1933 Securities Act and the 1934 Exchange Act far outweigh any differences which might exist, and that the widely held view that *Wilko* is applicable to both the 1933 and 1934 Acts is still correct. *See, e. g., Moran v. Paine, Webber, Jackson-Curtis,* 389 F.2d 242, 245 (CA3, 1960); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 n. 5 (CA2, 1964); *Starkman v. Seroussi,* 377 F.Supp. 518 (S.D.N.Y.1974).

impelled to review the same facts needed to establish the plaintiff's securities law claim.[4]

Parker's suit against Tandy is a horse of a distinctly different color. The original complaint, the amended complaint (filed a year after arbitration was denied), the record of the trial, the numerous special interrogatories submitted to the jury, and the opinion of the court rendered in entering judgment on the jury findings, reveal this to be essentially a dispute over corporate valuations centered around complex issues of accounting and valuation. The securities law claim was the rather small tail to a much larger dog.

An even more important consideration is seen when Parker's claims made in the original complaint are arranged in the sequence that logic commands. First is the "frontline" assertion, a plain vanilla suit for what amounts to specific performance of a contract which, according to Parker, unambiguously means what Parker says it means. Parker asserts that under such a contract it has performed (or perhaps is excused from further performance), and that Tandy has failed to perform because its accountants did not properly value inventory, did not use

[4]For another securities case where arbitration was denied because the arbitrator and court would have to deal with the same facts *see Stockwell v. Reynolds & Co.*, 252 F.Supp. 215 (S.D.N.Y.1965).

While we hold that the logic of decisions such as *Shapiro, supra,* and *Stockwell, supra,* has no application to the relationship between the plaintiff's federal securities and contract claims, we recognize that the reasoning in those cases applies to the relationship between the plaintiff's federal securities law claims and his state securities law claims and common law fraud claims. If an arbitrator were to resolve the plaintiff's Texas securities law and common law fraud complaints, he would be dealing ith the same facts which form the basis for plaintiff's claim of federal securities law violations. Therefore, we hold that plaintiff's claims under the Texas securities laws, like his claims under the federal securities laws, are not arbitrable.

proper accounting methods in valuing inventory, improperly handled the three liability items (computer contract, life insurance and vacation pay), and did not unqualifiedly ***p. 544*** certify their audit. Tandy having breached, Parker asks that the escrowed shares be delivered to it.

Parker's first fall-back claim is that the contract may be ambiguous. If it is, then resort must be had to oral representations made by Tandy. This extrinsic matter will resolve ambiguities in Parker's favor, or will require reformation of the contract because it does not exemplify the "true understanding" between the parties. Under the contract, either construed or reformed as Parker desires, Parker is entitled to win because Tandy breached that contract.

Up to this point, Parker's claims are seen as pure claims on the contract involving the terms of the merger agreement (as written, or as construed or reformed) and the application of those terms. If either of these positions by Parker were sustained before an arbitrator the controversy would be entirely or largely at an end except for the arbitrator's making adjustments in the valuation figures if appropriate. Thereafter Parker could hardly contend in a courtroom that Tandy's representations had fraudulently induced it to enter into a written contract which: (1) meant what Parker said it meant, that is, was consistent with Parker's contentions, or (2) embodied in it the oral representations made by Tandy and thereby set out the correct understanding between the two parties. Tandy's representations are irrelevant with respect to (1) or are incorporated into the contract under (2) as part of the "true agreement" between Parker and Tandy.

Parker's second fall-back position is that its management

was fraudulently induced by the oral representations of Tandy management to enter into a written contract which *differed* from the previously-made oral representations. Here the securities claim arises. The very existence of this claim is predicated upon Parker's first two positions being resolved *against* Parker. Unquestionably, the facts are to some degree intertwined and overlapping. But all of the policy reasons supporting arbitration apply here where arbitration may establish that a securities claim does not exist because the claimant's own assertions with respect to arbitrable issues are correct.[5] The parties, by their agreement, committed the resolution of contractual disputes to arbitration. Both the policy behind the United States Arbitration Act and considerations of judicial economy required that Parker's contractual claims be submitted to arbitration and that the federal securities law claims be stayed pending the outcome of those proceedings. Cf *Kavit v. A. L. Stamm & Co.*, 491 F.2d 1176 (CA2, 1974); *Black v. Econo-Car Int'l, Inc.*, 404 F.Supp. 600 (D.Mass.1974); *Harman Electrical Construction Co. v. Consolidated Engineering Co.*, 347 F.Supp. 392 (D.Del. 1972).[6]

---

[5]Plaintiff itself has recognized that its securities law claim cannot exist unless the contractual dispute between it and Tandy is resolved in the latter's favor. In the plaintiff's original complaint its federal securities law count is phrased as follows:

> "Alternatively, if the Merger Agreement is found unambiguous . . . then Tandy . . . employed a device scheme or artifice to defraud."

[6]Dependency is a two-way street, i. e., there exist situations where the arbitration should be stayed pending resolution of the securities law claims. For a case illustrating a situation where the arbitrable claims should be stayed *see Frier Industries, Inc. v. Glickman*, [1974-1975 Decisions] Fed.Sec.L.Rep. ¶94,845 (S.D.N.Y.1974). Moreover, if the claims are factually and legally independent, the court may allow both the arbitration proceedings and the trial of the securities law claims to go forward simultaneously. *E. g., Macchiavelli v. Shearson, Hammill & Co., Inc.*, 384 F.Supp. 21, 31 (E.D.Cal.1974). *See also Sam Reisenfeld & Son Import Co. v. S. A. Eteco*, 530 F.2d 679 (CA5, 1976).

We reverse and remand with directions that plaintiff's claims, other than those alleging violations of federal and state securities laws, and common law fraud claims be submitted to arbitration in accordance with the parties' agreement, and that resolution of the Texas and federal securities law claims and common law fraud claims be stayed pending the outcome of the arbitration proceedings.

REVERSED and REMANDED with directions.

3. Opinion of the United States Court of Appeals for the Fifth Circuit, Denying Rehearing.

Harper SIBLEY, Jr., Plaintiff-Appellant, Cross Appellee,

v.

TANDY CORPORATION et al., Defendants,

Tandy Corporation, Defendant-Appellee, Cross Appellant.

No. 75-1243.

United States Court of Appeals,
Fifth Circuit.

Feb. 18, 1977.

Appeals from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING
Before GEWIN, GOLDBOLD and SIMPSON, Circuit Judges.

PER CURIAM:

The linchpin of Parker's petition for rehearing concerns this sentence in our opinion, 543 F.2d at 542: "By a timely motion Tandy moved to have the contract submitted to arbitra-

tion and to have the federal securities law claims stayed pending arbitration." Parker correctly points out that Tandy's *motion* did not ask for a stay of the nonarbitrable federal securities law claims pending arbitration but only the arbitrable claims. This being so, Parker asserts that with respect to the securities law claims the results of the trial should be permitted to stand. Parker's petition makes it necessary that we state at greater length what occurred in the district court with respect to possible stays.

Parker responded to Tandy's motion to stay with a brief urging the district court to deny the motion and to hold that the entire dispute must be tried in the court because all issues were indistinguishable, inextricably intertwined and incapable of severance. Alternatively, Parker asked that if a severance was granted the court enter an order that arbitration should not begin until after the securities law claims had been tried. Tandy responded with a reply brief [1] in which it requested that trial of the securities law claims be stayed.

In short, the parties squarely put before the court the question of what it should do: should it try all issues, or carve out the arbitrable issues, and, if the latter, should it stay trial of the securities claims until the arbitration was concluded, or stay arbitration until the trial concluded, or stay neither and permit both trial and arbitration to proceed. The court accepted Parker's primary argument. It ordered that all issues should be tried before the court and declared that arbitration of any issues was inappropriate and would violate the federal securities law.

---

[1] It pointed out various of the considerations noted in our opinion which mandated that arbitration should be first in time.

This case is "essentially a dispute over corporate valuations centered around complex issues of accounting and valuation. The securities law claim was the rather small tail to a much larger dog." 543 F.2d at 543. As we explained in our opinion, both the nature of the dispute and the claims made by Parker cried out for arbitration's being first in time. Parker, however, successfully urged upon the court its primary position that everything must be settled in court and that nothing could be arbitrated. It not only prevented arbitration's being first in time but also secured a declaration that foreclosed the possibility of arbitration and trial proceeding simultaneously. Having persuaded the court to choose a course 180 degrees off the correct one, Parker has little force to his argument that he should be permitted to enjoy the substantial benefits of a trial that should not have been held. We have previously rejected such an argument, *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 929 (C.A.5, 1970), and we do so again. The argument is inconsistent with the policies underlying the Arbitration Act. It is inconsistent with judicial recognition of arbitration as a socially desirable instrumentality for the settlement of disputes outside the courtrooms of beleaguered courts. In the long run, acceptance of it would ill serve both the courts and those who voluntarily contract to arbitrate their disputes.

The suggestion is made that our opinion cuts off Parker from asserting after arbitration any securities law claims it might have. We have not intended to suggest that. We did, and do, suggest that in a practical sense arbitration first in time might have disposed of this suit and, if not, might have limited its scope and clarified it. And it still might.

The petition for rehearing is DENIED.

Supreme Court, U. S.
FILED
JUN 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 76-1614

HARPER SIBLEY, JR., *Petitioner*,

v.

TANDY CORPORATION, ET AL, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Respondent Tandy's Brief In Opposition

CECIL E. MUNN
1800 First National Building
Fort Worth, Texas
817/335-9593
Counsel for Respondent
Tandy Corporation

Of Counsel:
SLOAN B. BLAIR
CHARLES L. STEPHENS
1800 First National Building
Fort Worth, Texas

June 18, 1977

Fort Worth Brief Printing Co., 610 S. Jennings Street, 332-4070, 336-4524

SUBJECT INDEX

Page

Index of Authorities ii

Opinions Below 2

Jurisdiction 2

Question Presented 2

Statutes Involved 3

Statement of the Case 3

Background of the Contract in Suit 3

Parker's Warranted Net Worth 5

The Escrow Agreement 6

Arbitration Provision 7

The Dispute Over Parker's Warranted Net Worth 8

Tandy's Impoundment Notice 10

Sibley's Trial Court Position 11

Argument 15

The Decision Below Correctly Preserved the Federal Policy Favoring Arbitration, As to Arbitrable Contractual Issues, While at the Same Time Preserving Petitioner's Right to Judicial Resolution thereafter of the Non-Arbitrable Fraud Claims Based on the Federal Securities Act, if not Mooted by that Arbitration 15

Conclusion 33

Certificate of Service 34

INDEX OF AUTHORITIES

Cases Page

A&R Realty Co. v. NW Mutual Life Ins., Co., 95 F.2d 703 (8th Cir. 1938) 27

American Locomotive Co. v. Chemical Research Corp., 171 F.2d 115 (6th Cir. 1948) 24n

Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (5th Cir. 1962) 25

Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (5th Cir. 1955) 26

Black v. Econo-Car International, Inc., 404 F.Supp. 600 (D.C. Mass. 1975) 19

Caradelis v. Refineria Panama, S.A., 384 F.2d 589 (5th Cir. 1967) 27n

Firestone Tire & Rubber Co. v. International Union, Etc., 476 F.2d 603 (5th Cir. 1973) 26n

Formigli Corp. v. Alcar Builders, Inc., 329 F.2d 79 (3rd Cir. 1964) 26n

Galt v. Libbey Owens Ford Glass Co., 376 F.2d 711 (7th Cir. 1967) 22

General Guaranty Ins. Co. v. New Orleans General Agency, Inc., 427 F.2d 924 (5th Cir. 1970) 28, 29

Gloria S/S Co., Inc. v. Smith, 376 F.2d 46 (5th Cir. 1967) 27

Hart v. Orion Ins. Co., 427 F.2d 528 (10th Cir. 1970) 26n

Jackson Brewing Co. v. Clarke, 303 F.2d 844 (5th Cir. 1962) 26n

Macchiavelli v. Shearson, Hammill & Co., Inc., 384 F.Supp. 21 (E.D. Ca. 1974) 19, 20

Moseley v. Electronic Facilities, 374 U.S. 167 (5th Cir. 1963) 23, 24

Necchi v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693 (2nd Cir. 1965) 25n

Prima Paint Corp. v. Flood & Conklin, 388 U.S. 395 (1967) 28n

INDEX OF AUTHORITIES (Continued)

Cases Page

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 28n

Shapiro v. Jaslow, 320 F.Supp. 598 (S.D.N.Y. 1970) 16-19

Sibley v. Tandy Corporation, 543 F.2d 540 (5th Cir. 1976) 2, 13-15, 18, 19, 24, 26, 27, 32

Standard Chlorine of Delaware v. Leonard, 384 F.2d 304 (2nd Cir. 1967) 26-27

Stockwell v. Reynolds & Co., 252 F.Supp. 215 (S.D.N.Y. 1965) 13, 14, 20-22

Victor Talking Mach. Co. v. George, 105 F.2d 697 (3rd Cir. 1939) 27

Victory Transport, Inc. v. Comisari General, 336 F.2d 354 (2nd Cir. 1964) 25n

Western States Mach. Co. v. S.S. Hepworth Co., 152 F.2d 79 (2nd Cir. 1945) 27

Wilko v. Swan, 346 U.S. 427 (1953) 1, 2, 17, 22, 29

Statutes

9 U.S.C. §1 28

9 U.S.C. §2 12

9 U.S.C. §3 ..... 3, 24

15 U.S.C. §78cc(a) 3

28 U.S.C. §1254(1) 31

28 U.S.C. §1292(a)(1) 26

29 U.S.C. §185 25

40 U.S.C. §270a-270d 23

Rules

United States Supreme Court Rule 19-1(b) 2, 31

United States Supreme Court Rule 40(3) 3

Text

Annotation, "Appealability of Federal District Court Order Granting or Denying Stay of Action Pending Arbitration," 99 L.Ed. 241 26

PREFACE

The Record on Appeal before the United States Court of Appeals for the Fifth Circuit consisted of an Appendix of five volumes, Volume I containing an Index to Volumes I-IV and Volume V containing the Exhibits and an Index to same. References in this Brief to "A" and a page number are to such Appendix. There is also an Appendix to the Petition. For distinction, references to that Appendix will be designated "A. to Petition" followed by a page number.

Emphasis supplied throughout this Brief.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 76-1614

HARPER SIBLEY, JR., *Petitioner,*

v.

TANDY CORPORATION, ET AL, *Respondents.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Respondent Tandy's Brief In Opposition

Petitioner's effort to secure further review by this Court is bottomed upon the false premise that the opinion below of the Court of Appeals has established a new standard that abrogates the rule of *Wilko v. Swan*, 346 US 427 (1953). When the Fifth Circuit's opinion is correctly interpreted as simply ruling that the trial court erred in failing to stay trial of the non-arbitrable but *dependent*[1] federal securities fraud issue pending arbitration of contractual issues, it readily appears that the Fifth Circuit has properly

---

[1] Dependent because Petitioner's Complaint (A. 14, ¶19) made it so by alleging Count IV, the 10-b fraud claim, only in the alternative if the contract sued upon be "found unambiguous" and if he lost on his contractual, equitable claims of specific performance and reformation.

preserved the federal policy favoring arbitration[2] without in any manner repudiating *Wilko*.

OPINIONS BELOW

The initial opinion of the Court of Appeals is reported at 543 F.2d 540 (5th Cir. 1976). The subsequent opinion denying Petitioner's Motion for Rehearing is not reported. Both opinions of the Court of Appeals, and that of the District Court denying Respondents' Motion to Stay, are all included in the Appendix to the Petition for Writ of Certiorari and hence are not repeated herein.

JURISDICTION

The jurisdictional requisites for filing the Petition for Certiorari are adequately set forth in the Petition. Respondents deny that the Petition presents any of the grounds required by Rule 19-1(b) of this Court for the granting of a Writ of Certiorari.

QUESTION PRESENTED

Where a plaintiff alleges non-arbitrable federal securities claims only in the alternative and conditioned upon his failing to recover on his arbitrable contractual claims, should this Court review by certiorari determination by the Court of Appeals that the Trial Court erred in failing to grant Respondents' request that the non-arbitrable issues be stayed pending arbi-

[2]Especially favored where, as under the unique circumstances present here, arbitration of the contractual issues may dispose of all issues because, as conceded by Petitioner, if he be successful in arbitration, his 10b-5 claims must be rejected.

tration of the arbitrable contractual claims in accordance with the arbitration clause of the contract sued upon?

STATUTES INVOLVED

The pertinent provisions of the Exchange Act, 15 USC §78cc(a), and of the United States Arbitration Act, 9 USC §3, are set forth in the Petition (p. 4).

STATEMENT OF THE CASE

Petitioner Sibley's ("Sibley") statement of the case is argumentative, inaccurate and incomplete, compelling this counterstatement to correct his inaccuracy and omission (Supreme Court Rule 40[3]):

Background of the Contract in Suit

Because this is a suit on contract, we first examine the factual background of its negotiation and consummation.

P. J. Parker, Inc. ("Parker") was a privately held corporation organized in January 1970 to acquire Hickok Manufacturing Co., Inc., a manufacturer and seller of men's belts, wallets, jewelry, etc. As Parker reported on July 1, 1971, to the Justice Department[3],

[3]This report (Pl. Ex. 11, A. 1816, admitted A. 321) was presented to the Antitrust Division of the Justice Department to explain why it should immediately grant Parker, under the "failing corporation" doctrine, antitrust clearance to merge with Tandy, thereby enabling Parker's attorneys to submit an opinion that no material proceeding or governmental investigation was pending or threatened against the Parker company or its wholly owned subsidiary Hickok (which opinion was a condition precedent to consummation of the merger [Article VII, A. 1784-1786]).

it:

> "was formed by a group of businessmen principally from Rochester to prevent Hickok's bankruptcy" (A. 1817).

Hickok was acquired by Parker on February 20, 1970, but Hickok's financial condition continued to deteriorate. Additional financing was sought without success. The bankers were fidgeting. In the spring of 1971 Parker negotiated with Tandy concerning a statutory merger and a tentative agreement was reached. On April 21, 1971, Mr. P. J. Parker, its president, wrote each member of his board of directors in support of the proposal (Pl. Ex. 9, A. 1765, admitted A. 259-60). He described the precarious financial plight of Parker and predicted its imminent insolvency:

> "Although in time I think we can become competitive, we have to operate with poor profits in the meantime and poor profits may not generate enough money to pay our debts as they become due." (*Id.*, A. 1768).

A formal, written "Merger Agreement" (Pl. Ex. 10, A. 1769, admitted A. 285) (the contract here sued upon) was executed June 4, 1971. The contract contemplated a closing on July 1, 1971 (¶4.1, A. 1777).

In further support of the merger, that would result in a refinancing of the Parker-Hickok operations, Mr. Parker reported to his board of directors on June 10, 1971:

> ". . . without the needed financing, the company would cease to be a viable operation by September of 1971." (Def. Ex. 4, A. 2047 at 2054, admitted A. 408-9).

The Justice Department had questioned the merger from an antitrust standpoint. To secure requisite clearance, Mr. Parker went to Washington and met with the Antitrust Division of the Justice Department, presenting a set of documents[4] he had prepared for the meeting. This report in unmistakable language disclosed Parker's financial desperation:

> "The financial tables show that without a major infusion of cash on July 1, Parker will have to declare bankruptcy on July 2." (A. 1817).

One of those tables ("Cash Forecast", p. 3 of such Pl. Ex. 11, supra, p. 3 n. 3) showed that beginning at June 28, 1971, Hickok did not even have funds available to meet its payroll.

The Justice Department acted promptly. It gave clearance on July 1, 1971 and Closing was had on the same date (Parker's testimony, A. 322, lines 4-12).

Parker's Warranted Net Worth

Section 5.2(a) of the Merger Agreement defined the "Purchase Price" for the interest being acquired by Tandy in the merger as being $3,830,970 (payable in Tandy stock). Because the Parker-Hickok financial plight demanded immediate action, there had been no time to verify that the warranted values Tandy was to receive in fact existed. Consequently, the "Purchase Price" payable was subject to deduction if a future balance sheet did not reflect the guaranteed net worth minimum. Section 3.1 warranted that Parker's con-

[4] The report referred to supra, fn. 3, p. 3.

solidated net worth as of June 30, 1971:

> "as shown in a consolidated balance sheet to be prepared in accordance with Article VIII of this Plan, shall be not less than $1,957,000" (A. 1774)

Section 8.3 of such agreement provided that, in order to ascertain such consolidated net worth as of such date and the accuracy of the Parker representations and warranties with respect thereto, Parker's consolidated balance sheet as of June 30, 1971 and the related P&L statement for the six-month period then ended (collectively the "1971 Audit") were to be examined by the national accounting firm of Price Waterhouse & Co. (A. 1789).

The Escrow Agreement

Attached to the Merger Agreement as its Exhibit "B" was the "Escrow Agreement" to be executed at Closing. It was so executed and delivered at Closing on July 1, 1971, as an integral part of the contractual arrangement. Its purpose, as specified in ¶8.2 of the Merger Agreement, was to "secure the representations and warranties of Parker" made in the basic agreement (A. 1789).

Paragraph 5.4 of the Merger Agreement (A. 1780) provided that 1/3rd of the amount of Tandy shares payable as the "Purchase Price" was to be placed in escrow with and held by the Escrow Agent:

> "as security for the performance by Parker of the covenants to be performed by it under the Plan and for the accuracy of the representations and warranties made by Parker in the Plan" (A. 1984),

and:

> "to secure and indemnify Tandy in the manner hereinafter stated against and in respect of any *Damages* suffered by Tandy" (¶2, A. 1987).

"Damages" was defined by the Escrow Agreement to specifically include:

> "All losses . . . sustained, directly or indirectly, by Tandy . . . to the extent that they . . . result from a breach of any of the warranties made by Parker in the Plan . . . Damages shall include:
>
> "(a) The amount of any liability . . . of Parker or Hickok . . . not included among or reflected in . . . the 1971 Audit. (A. 1985).
>
> * * *
>
> "(e) One Hundred Ninety-Six percent (196% of the amount by which the consolidated net worth of Parker, as shown in the 1971 Audit, shall be less than $1,957,000."[5] (A. 1986).

Under the terms of the Escrow Agreement, the amount of the Purchase Price was thus subject to reduction in an amount equivalent to 196% of the dollar amount, if any, by which the consolidated net worth of Parker, as shown in such 1971 Audit, was less than the warranted amount of $1,957,000.

Arbitration Provision

In both the Merger and Escrow Agreements express

[5]The reason why the parties agreed upon this 1.96 factor in case of a Parker net worth deficiency was that Tandy was paying $1.96 of Purchase Price for every $1.00 of guaranteed net worth. The total Purchase Price of $3,830,970 divided by the $1,957,000 guaranteed net worth equals $1.96 (A. 1545, lines 6-13).

provision was repeatedly made for arbitration of any dispute or controversy arising thereunder. Any such arbitration was to be conducted:

> "in Fort Worth, Texas in accordance with the laws of the State of Texas and the Rules of the American Arbitration Association. . . ." (¶11.1, A. 1792).

The Dispute Over Parker's Warranted Net Worth

Promptly after Closing, the inventory of Parker-Hickok contemplated by the Merger Agreement was commenced. It quickly became apparent that recent returns by dissatisfied buyers of Hickok merchandise were reaching all-time highs. Subsequently, after this litigation was commenced and during the course of discovery, Tandy ascertained that Parker had made a deliberate attempt to conceal these "abnormally high number of returns"[6] which were "coming in at the highest rate in . . . (Hickok's) history."[7] The concealment was effectuated on June 4, 1971, the very day the Merger Agreement was signed, by instruction from Parker to all of its managers to attempt to *delay* returns of merchandise by customers until after July 1 — the contractual date for Closing of the merger:

> "No additional returns will be accepted in the house *until July 1*. . . .
>
> "If for some reason a salesman must remove goods from a store prior to July 1, do all in your

[6] Mr. Parker's letter to one of his bankers of May 4, 1971 (Def. Ex. 2, A. 2037; admitted A. 404).

[7] Telegram from Parker's Merchandising Manager to all Sales Managers of March 22, 1971 (Def. Ex. 6, A. 2060 at 2061; admitted A. 437-8).

> power to have it shipped to reach us *after* July 1. If it comes in earlier, it will not be processed anyway." (Def. Ex. 7, A. 2063; admitted A. 438)

Under date of October 22, 1971, Price Waterhouse & Co. ("PW") issued its first draft of the 1971 Audit (Pl. Ex. 29, A. 1893; admitted A. 514). The Petition (pp. 17-18, 21) twice inaccurately and inexcusably represents that this draft "showed Petitioner to be entitled to all the escrowed Tandy stock." This is just not so. That draft expressly pointed out that there were "unresolved matters which affect the accompanying financial statements" (A. 1894) and that accordingly PW was of the opinion that those financial statements "do *not* present fairly the financial position of P. J. Parker, Inc. and subsidiaries at June 30, 1971, or the results of operations for the six months then ended." (A. 1895). PW's opinion cautioned that any reliance on the attached financials for purposes of the Merger Agreement should be subject "to any adjustments that may result" from resolution of the differences of opinion existing between the parties to such agreement (A. 1895).

That there were at that time such unresolved matters affecting the net worth of Parker indisputably appears from Mr. P. J. Parker's letter of September 25, 1971 to PW (Pl. Ex. 14, A. 1833; admitted A. 348) challenging the PW draft. Mr. Parker attached to his letter an exhibit showing the net worth according to the PW draft as compared to the larger net worth reflected in his own "P. J. Parker Draft" (A. 1840).

Tandy's Impoundment Notice

The Escrow Agreement afforded Tandy the right, if it believed it had a claim for or had suffered Damages, to give notice impounding sufficient number of the escrowed shares as would be sufficient to indemnify Tandy for the amount of Damages specified in such notice (¶4, A. 1988). A time limit was imposed however because the first half of the escrowed Tandy shares was to be released on December 31, 1971 and delivered by the Escrow Agent to the Sibley group unless impoundment be theretofore effected (¶8, A. 1990). Under a similar provision, the other half of the escrowed shares was to be delivered on June 30, 1972, absent impoundment. Thus, if Tandy wanted to assert any claim secured by the escrowed shares, it was required to give notice prior to the two deadlines imposed.

With the accounting disputes unresolved and the first deadline rapidly approaching, Tandy did what the parties had agreed in §4 of the Escrow Agreement (A. 1988) it should do: it gave an impoundment notice by letter dated December 13, 1971 (Pl. Ex. 38, A. 1982; admitted A. 729).

Such notice was in strict compliance — the exact opposite of a breach — with the express terms of the Escrow Agreement. Yet the Trial Court not only permitted Parker to repudiate the detailed provisions of both agreements, calling for arbitration of disputes arising under such contracts, but even worse, described Tandy's action in following the procedure specified by the parties as a "malicious and willful *breach* of con-

tract" (A. 183). Instead of availing of the right granted by the Merger Agreement [¶8.3(d), A. 1790] to have an independent third party accountant resolve the disputed accounting matters, or to seek such resolution by the contractually agreed arbitration, Sibley resorted to litigation.

Sibley's Trial Court Position

Petitioner's Complaint advanced six counts which we next analyze because the position taken in them had a crucial bearing upon proper determination of Tandy's Motion to Stay:

> *Count I* — sought specific performance of the contract sued upon by asserting a right to receive the escrowed Tandy stock "in accordance with the Agreements" (A. 11-12, ¶13).
>
> *Count II* — likewise sought specific performance, concluding plaintiff was entitled "to all of the escrowed stock" (A. 12, ¶16).
>
> *Count III* — sought reformation of the contract (A. 12, ¶17).
>
> *Count IV* — was only alleged in the alternative and if the contract in suit be "found unambiguous" and if Respondent Tandy's reliance upon the 1971 Audit be sustained (A. 14-15).
>
> *Count V* — alleged that to the extent plaintiff breached its net worth warranty or failed to disclose all its material liabilities, it had a similar cause of action against the Hickok estate from whom it had acquired the Hickok corporation and

that Tandy succeeded to such cause of action, thereby offsetting any deficiency (A. 15, ¶24).

Count VI — again alleged common law fraud based on claimed misrepresentation as to future value of Tandy stock (A. 15, ¶25).

Counts I, II, III and V asserted contractual claims in *reliance* on the contract while Counts IV and VI alleged fraud in *disaffirmation* of the contract.

In response to service of the Complaint, Tandy promptly moved, under the Federal Arbitration Act (9 USC §2), for stay of the proceedings with respect to Counts I, II, III, V and VI "until arbitration of the issues arising under said counts has been had in accordance with the agreement between plaintiff and Tandy to arbitrate all such disputes" (A. 63). Subsequently, and some fourteen months prior to trial, Tandy sought stay of the statutory and common law fraud claims pending arbitration:

> "Tandy asks that the court stay both Counts IV (securities law count) and Count VI (common law fraud count) until the remaining counts can be arbitrated." (A. 83).

The Trial Court overruled the Motion to Stay on the erroneous ground that arbitration was "inappropriate in this cause"[8] because the contractual claims were "so intertwined with the rule 10b-5 allegations in Count IV. . . ."[9]

[8]A. to Petition, p. 2.
[9]A. to Petition, p. 3.

Thereafter, jury trial was had and judgment rendered on the merits in favor of Petitioner, from which *both* Sibley and Tandy appealed. The Fifth Circuit ruled that the Trial Court:

> "erred when it denied Tandy's motion to submit the contract claims to arbitration and refused to stay the securities fraud claims pending the outcome of that arbitration".[10]

The Fifth Circuit's opinion expressly noted that it was not passing upon the merits and instead was only considering:

> "the problem of what a court should do where arbitrable claims are joined with claims not subject to arbitration."[11]

Sibley's Petition advances as if controlling here the decision in *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965). Before the Trial Court he conceded (A. 77) that *Stockwell* was "factually distinguishable from the instant case" because

(a) the 10b-5 fraud counts in *Stockwell* were "all-inclusive" while

(b) in Sibley's case, he would be entitled to judgment if the contract he sued upon was unambiguous and required the Parker net worth to be calculated as he desired even though this would be a bar to his fraud claims (because he could not recover under mutually exclusive and contradictory theories).

[10]A. to Petition, p. 8.
[11]Ibid.

Sibley said that "because of this distinction" he was advancing *Stockwell* "only alternatively." His alternative position was that if arbitration were to be ordered, it should, as in *Stockwell*, be stayed pending "judicial disposition of the 10b-5 count." (A. 77).

Because the Court of Appeals ruled the sequence of events should be reversed, and that *arbitration* should come first, Sibley seeks certiorari (Petition, p. 6) on the ground that the Fifth Circuit thereby adopted a new and "unworkable and potentially wasteful standard." Such a claim flies in the teeth of Sibley's trial court position (A. 74) that if the contractual issues be resolved in Sibley's favor "there was no scheme" (i.e., no fraud) and that only if the contractual dispute be first resolved in Tandy's favor must "plaintiff's allegation of fraud . . . be resolved." (A. 74). Sibley thus recognized his contractual claims should be tried first, but he wanted them tried by the court instead of being resolved by the arbitration to which he had contractually agreed.

In view of Sibley's trial court position, it is inaccurate for the Petition (p. 4) to state here that:

> "This dispute has always turned upon what petitioner contends was a variance between respondent's pre-acquisition representations and its post-acquisition conduct"

because that dispute was only raised by alternative Count IV, made dependent upon Sibley's losing his claims for reformation and specific performance.

Based on allegations of the Complaint, as well as

the Amended Complaint and trial record, the Fifth Circuit's opinion characterized this litigation as being "essentially a dispute over corporate valuations centered around complex issues of accounting and valuation" (A. to Petition, p. 10). The arbitration process, based on the expertise of an arbitrator, is especially adapted for resolution of such complex commercial issues as contrasted with consideration of them by a jury of laymen.

ARGUMENT

The Decision Below Correctly Preserved the Federal Policy Favoring Arbitration, As to the Arbitrable Contractual Issues, While at the Same Time Preserving Petitioner's Right to Judicial Resolution thereafter of the Non-Arbitrable Fraud Claims Based on the Federal Securities Act, if not Mooted by that Arbitration.

While the contract in suit provided for arbitration of all disputes arising under it, Tandy expressly recognized before the Trial Court it was not entitled to arbitration of the 10b-5 fraud claims raised by Count IV of the Petition (Tandy's Brief in Support of Its Motion to Stay, A. 68, 70-1, ¶¶3-4). Since that Count IV was alleged only in the alternative (A. 14, ¶19), and because Sibley's position before the Trial Court was that only if he lost on his contractual claims must his "allegation of fraud . . . be resolved" (A. 74), Tandy requested the court to stay trial of the fraud claims of Counts IV and VI pending arbitration of the contractual issues (A. 83).

As alleged in the Complaint[12] Sibley sought mutually exclusive recoveries: The first an affirmance of the contract by seeking reformation and specific performance of it as to entitle his group to the escrowed shares of Tandy stock; and the second, disaffirmance of that contract by alternatively alleging fraud in the inducement.

The primary thrust of the Petition (p. 6) is that this Court should grant certiorari in order to correct what is said to be establishment of a new and "unworkable and potentially wasteful standard for determining arbitrability of disputes involving both arbitrable and non-arbitrable issues." This is mere pretense. No such standard was established.

The Petition's chief reliance is upon a 1970 decision by a New York United States District Court — *Shapiro v. Jaslow*, 320 F.Supp. 598. Shapiro sued both defendant Jaslow and defendant Newburger, Loeb & Co. ("Newburger"), alleging violation of the federal securities laws. Jaslow filed cross-claims against Newburger.

Newburger moved to stay Shapiro's action on the ground the Shapiro complaint alleged only wrongs at common law and hence should be subject to arbitration. Simultaneously Newburger caused a demand for arbitration to be served on Shapiro as well as upon Jaslow with respect to the Jaslow cross-claims against

[12]The Motion to Stay was overruled September 10, 1973 (A. 2, A. to Petition, p. 3). A year later Sibley filed his Amended Complaint (A. 3). In its determination the Fifth Circuit properly considered the position of Petitioner as set forth in its Original Complaint (A. to Petition, p. 12, fn. 5) because that was the only pleading of Petitioner before the Trial Court when it ruled on the Motion to Stay. For this the Petition (p. 22, fn. 12) faults the Fifth Circuit.

Newburger. Judge Bryan denied Newburger's motion to compel arbitration as against Shapiro under the doctrine of *Wilko v. Swan*, 346 U.S. 427 (1953) because the Shapiro claims were based on the federal securities laws. The subject opinion by Judge Mansfield does not involve such earlier action by Judge Bryan other than to mention it in passing.

Judge Mansfield's opinion does consider Newburger's contentions concerning the Jaslow cross-claims. Those Jaslow cross-claims against Newburger jointly alleged violation of the federal securities act *and* the common law. Newburger argued that while the Jaslow claims under the securities laws could not be arbitrated, the Jaslow "common law cross-claims should be subject to arbitration." (320 F.Supp. 599, bottom 2nd. col.).

As stated above, Newburger had instituted arbitration proceedings against both plaintiff Shapiro and cross-plaintiff Jaslow, and Judge Bryan had earlier disposed of Newburger's attempt to arbitrate Shapiro's federal securities law claims. Jaslow filed a cross-motion against Newburger seeking an order staying any arbitration proceedings against Jaslow. In the reported opinion, Judge Mansfield granted that motion.

In so doing, he reasoned that he could not "separate out the common law from the federal law issues" asserted in the combined allegations of Jaslow asserted in single ¶11 of the Jaslow cross-complaint, and that if he could not do so, *a fortiorari*, an arbitrator could not. He ruled that consequently Newburger could not

defeat the judiciary's "exclusive jurisdiction over the Federal Securities Act claim by compelling arbitration of an ancillary pendent dispute" (320 F.Supp. 600, ¶2, 3).

Even if the District Court's holding in *Shapiro* had been binding on the United States Court of Appeals for the Fifth Circuit, the latter's opinion in our case poses no conflict with Judge Mansfield's decision. Tandy had conceded in the Trial Court that the federal securities fraud claims of Count VI were "similar" and so "should be tried together" (A. 80). The Fifth Circuit's opinion agreed with the trial judge below and with the rationale of *Shapiro* that when it is:

> "impractical if not impossible to separate out non-arbitrable federal securities law claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims." (A. to Petition, p. 9).

But the Fifth Circuit ruled the contract claims asserted by Sibley's Counts I, II, III and V were not " 'intertwined' in the legal sense." In so doing, the Court applied the legal test of *Shapiro* but simply found the Sibley contractual claims fell outside the ambit of that test.

The Petition (p. 8) distorts what the Fifth Circuit's opinion said. It did not create a test that a dispute be deemed "wholly non-arbitrable if the arbitrable and non-arbitrable issues are 'intertwined in the legal sense' " but "partly arbitrable if *those issues* 'are [only] to some degree intertwined and overlapping' or 'dependent.' "

Instead, in distinguishing *Shapiro*, the Fifth Circuit's opinion[13] stated that, in the case at bar, Sibley's "claims were not 'intertwined' in the legal sense." At the same time the opinion correctly recognized that the 10b-5 claim was "dependent" upon the contract claims. This, as we have seen, *supra*, p. 1, fn. 1, was because Petitioner made it dependent in his pleading. Later in its opinion the Fifth Circuit supported "dependency" by pointing out that the fraud claims, sounding in tort, were predicated upon Parker's (i.e., Sibley's) contractual positions being resolved against Parker, even though recognizing that "the *facts* are to some degree intertwined and overlapping." This is not a statement that the *issues* were intertwined and overlapping, as Petitioner claims here.

Nor was this the first time that a federal court has ruled arbitration could be had of arbitrable claims while non-arbitrable claims be stayed even though arbitration would "greatly reduce the fact issues remaining in the anti-trust (i.e., the non-arbitrable) count. *Black v. Econo-Car International, Inc.*, 404 F.Supp. 600, (D.C. Mass. 1975), 602, ¶1.[14]

In *Macchiavelli v. Shearson, Hammill & Co., Inc.*, 384 F.Supp. 21 (E.D. Ca. 1974), the court discussed the power of a District Court to split federally cognizable issues from arbitrable issues. Even though stating the two sets of claims before it were related, it referred to arbitration contractual issues and retained

---

[13]A. to Petition, p. 9.

[14]In *Black* the non-arbitrable claims grew out of allegations of Sherman and Clayton Act violations, but the Petition (p. 9, fn. 4) deems rulings in anti-trust suits analogous on the point.

jurisdiction over the 10b-5 issues, saying that such a severance:

> "would serve well the purposes of both the Securities and Exchange Act of 1934 . . . and the Federal Arbitration Act."

In so doing it noted that "Breaches of contract are the archetypal kinds of dispute referable to arbitration" (384 F.Supp. 30, ¶13-15).

Nor does *Stockwell v. Reynolds & Co.*, 252 F.Supp. 215 (S.D.N.Y. 1965), the other federal District Court case upon which Petitioner places primary reliance, offer him any better support. He cites (Petition, pp. 7-8) *Stockwell* as if holding that if any of the same facts affect both arbitrable and non-arbitrable "legal theories," the entire dispute must be judicially resolved and none of it can be arbitrated.

Stockwell held no such thing. It could not have so held because the opinion concludes by stating (252 F.Supp. 221, ¶12) that defendants' motion for an order directing arbitration as to Counts II and III was granted, although arbitration was to be stayed pending final determination by the court of non-arbitrable Counts I and IV (10b-5 counts) because judicial determination of Counts I and IV "would have a definite bearing on the outcome of the arbitration proceedings." (252 F.Supp. 220, top 2nd col.).

Stockwell deals with a number of motions filed in two separate action in each of which plaintiffs were citizens of the State of Washington and defendants were Reynolds & Co., a New York stock brokerage

partnership, and Ralph E. Carpenter, a New York citizen and partner in defendant Reynolds & Co. and at all relevant times a director of Alside, Inc., whose stock was listed on the NYSE. Each of the two complaints involved contained five counts — three against both defendants and two against defendant Carpenter alone:

> Count I — charged federal securities act violation;
>
> Count II — charged common law fraud;
>
> Count III — charged common law negligence;
>
> Count IV — repeated charge of securities act violation by defendant Carpenter alone;
>
> Count V — charged Carpenter with breach of fiduciary duty as a director of Alside.

Among the motions considered by the opinion were those seeking an order directing Counts II, III and V be submitted to arbitration pursuant to the arbitration clause in the Customer's Agreement entered into by defendant Reynolds & Co. with each plaintiff. Defendants did not seek arbitration of the federal securities fraud claims but only arbitration of common law claims, including common law fraud.

The opinion expressly stated that, while Counts II and III *were* subject to arbitration, since the relief sought in such two counts was based on the same transactions as were the subject of the federal securities act non-arbitrable Counts I and IV:

> "There would appear to be little purpose in having both the court proceeding and the arbitration going on at the same time"

and that since ultimate determination by the court of Counts I and IV would have a definite bearing on the outcome of the arbitration proceeding, the court was "not prepared to direct arbitration of Counts II and III at the present time" (252 F.Supp. 220, ¶¶4-7).

Galt v. Libbey Owens Ford Glass Co., 376 F.2d 711, 715 (7th Cir. 1967)[15] explains the holding in *Stockwell* as being that:

> "arbitration of Counts I and IV of the complaint was precluded by the doctrine of *Wilko v. Swan.* . . . nevertheless, the District Court granted the defendants' motion that the subject matter of Count II and III be submitted to arbitration. Arbitration of those counts was stayed temporarily because arbitration of Counts I and IV foreclosed by the *Wilko* case."

Stockwell thus ruled that the common law fraud claim was arbitrable even though based on the same transactions as the non-arbitrable federal securities fraud claim. It merely stayed arbitration pending judicial determination of the non-arbitrable claims.

In the case at bar, the reverse sequence was proper, as ruled by the Fifth Circuit, because Sibley's pleadings made it proper, conditioning his non-arbitrable fraud claims upon first resolution against him of his arbitrable contractual claims.

Illustrating the importance of the pleadings in determination of whether arbitration of arbitrable issue or trial of non-arbitrable issues should have prece-

[15]cited by Petitioner (Petition, p. 19-20).

dence is this Court's decision in *Moseley v. Electronic Facilities*, 374 US 167 (1963). There, disputes arose under subcontracts coming within the scope of the Miller Act, 40 USC §§270a-270d. Respondent filed a suit in a New York state court seeking an order directing arbitration in accordance with arbitration provisions of the subcontracts. Thereafter, Moseley filed the reported litigation in a U. S. District Court of Georgia seeking recovery of amounts allegedly due under the subcontracts, or recission of them on the grounds of fraud and recovery on a *quantum meruit* basis, and an injunction enjoining Electronic from proceeding with its arbitration efforts in the New York action. The U. S. District Court granted a restraining order directed at the New York arbitration proceeding. The Court of Appeals reversed, holding that Moseley must arbitrate in New York.

Moseley's pleading had attacked the arbitration clause as having been a means used to effect a fraudulent scheme. This Court there stated:

> "With the *pleadings in this posture*, we are obliged to pass upon the *priority* in determination of that issue (i.e., fraud in procuring insertion of the arbitration clause in the subcontracts) in the trial of the case." 374 US 171.

The opinion reasoned that the issue of fraud in the inducement of the arbitration provision must be determined first because if determined favorably to Moseley, "there can be no arbitration under the subcontracts." Priority was given to trial of that fraud

issue because "disposition of the fraud issue may dispose of the entire suit." *Ibid.*

Contrasted with the status of the pleadings there, in the case at bar prior disposition of Sibley's Count IV and VI fraud claims could not dispose of his contractual claims. The converse, as we have seen, was true, if arbitration disposed of them as Sibley claimed they should be resolved. Based on the status of Sibley's pleadings, the Fifth Circuit properly gave priority to the arbitrable issues and stayed trial of the non-arbitrable issues pending the outcome of that arbitration.

Sibley's Petition would deny a United States Court of Appeals the power to countermand any exercise of discretion by a trial court. While we question his contention that Tandy's motion merely called for an exercise of the trial court's discretion[16], determination of that legal question has no bearing upon the correctness of the Fifth Circuit's opinion. If it was a matter of discretion, the Court's ruling amounts to one that the trial court abused her discretion. If the trial court has any discretion in the matter, it could only be with respect to determination of arbitrability because the Federal Arbitration Act requires in mandatory language a stay of trial of arbitrable issues (9 USC §3). And as to arbitrability, this Court has ruled it:

> "is a matter to be determined by the Court on

[16]See *American Locomotive Co. v. Chemical Research Corp.*, 171 F. 2d 115 (6th Cir. 1948), stating at p. 122 that the matter of a stay for arbitration:

> "would seem to us to be one within the judgment of the trial judge rather than a matter of discretion, reversible only for abuse. . . ."

> the basis of the contract entered into by the parties.," *Atkinson v. Sinclair Ref. Co.*, 370 US 238, 241 (1962)."[17]

so there would seem to be little left to discretion.

In any event, whether such determination of arbitrability by a trial court be an exercise of discretion or of legal judgment, a United States Court of Appeals has the power to review any such determination and even to make one *"de novo"*[18] *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693 (2nd. Cir. 1965). There, the District Court had referred the entire matter to arbitration without first passing upon which issues were arbitrable within the terms of the arbitration provision of the contract involved. After stating that an order compelling a party to arbitrate under such a contractual provision:

> "is simply an order granting specific performance of an arbitration provision. . . ." (348 F.2d 696, ¶¶3-7)[19]

the Second Circuit in its opinion proceeded to "rule on the arbitrability of each of the items" (348 F.2d 697, ¶8).

[17]While *Atkinson* was an action to compel arbitration under §301 of the Labor Management Relations Act, 29 US §185, the same principle is "equally applicable in proceedings to compel arbitration . . . under the federal arbitration act." *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 696, bottom 2nd col. (2nd Cir. 1965).

[18]to use the expression of Petitioner (Petition, p. 8, 11).

[19]To the same effect is *Victory Transport, Inc. v. Comisari General*, 336 F.2d 354, 364, ¶14 (2nd Cir. 1964):

> "Implicit in the agreement to arbitrate is consent to enforcement of that agreement".

The Petition (p. 10) even quarrels with the rule — based on the ancient distinction between law and equity — governing appealability of an interlocutory order. Sibley would have this Court grant certiorari and expend its time considering a matter it has already ruled upon in *Baltimore Contractors, Inc. v. Bodinger*, 348 US 176 (1955) and a matter that has been dealt with at length by other decisions of this and lower courts. See: *Annotation*, "appealability of federal District Court order granting or denying stay of action pending arbitration" 99 L.Ed. 241. Under that historical distinction, an interlocutory order is not appealable within the statutory exception of 28 USC §1292(a)(1) if equitable relief is sought because "a stay of an equity type proceeding is to be considered akin to an order within the action itself." *Standard Chlorine of Delaware v. Leonard*, 384 F.2d 304, 307, ¶2 (2nd Cir. 1967). In so ruling, the Second Circuit expressly stated it was agreeing with the Fifth Circuit rule[20] *(Id.*, 384 F.2d 308, ¶2), as does the Third Circuit[21], and as does the Tenth Circuit."[22]

In *Standard Chlorine*, as in the case at bar, plaintiff had not only sought damages for fraud but had also sought reformation (and damages for breach of contract after the contract was reformed). Based on this Court's ruling in *Baltimore Contractors, Inc. v. Bodinger, supra*, the Second Circuit in *Standard* felt ob-

[20]Which rule it quotes from *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5th Cir. 1962). See also *Firestone Tire & Rubber Co. v. International Union, Etc.*, 476 F.2d 603, 604, ¶1 (5th Cir. 1973).

[21]*Formigli Corp. v. Alcar Builders, Inc.*, 329 F.2d 79, 80 (3rd Cir. 1964).

[22]*Hart v. Orion Ins. Co.*, 427 F.2d 528, 530, ¶1 (10th Cir. 1970).

liged to:

> "conclude that Standard's complaint was sufficiently equitable in nature so that Judge Ryan's order was *not* appealable." 384 F.2d 309.

Sibley, having sought equitable relief (specific performance in Counts I and II and reformation in Count III), the Trial Court's order overruling Tandy's Motion to Stay was unappealable in at least the Fifth Circuit, if not in all others. But even if Tandy could have perfected an appeal from the Trial Court's interlocutory order denying Tandy's Motion to Stay, a second answer to Sibley's procedural criticism of the action of the Fifth Circuit in even giving consideration to Tandy's challenge to the Trial Court's denial in Tandy's appeal from a final judgment of the Trial Court is that such an interlocutory appeal is but permissive — not mandatory:

> "An interlocutory appeal is permissive rather than mandatory, and an aggrieved party may, at his election, decline to appeal an interlocutory order but appeal from the final determination of the case and at that point raise all questions involved in the case."[23]

See also: Judge Sanborn's opinion in *A&R Realty Co. v. NW Mut. Life Ins. Co.*, 95 F.2d 703, 705 (8th Cir. 1938); *Victor Talking Mach. Co. v. George*, 105 F.2d 697, 699, ¶¶1-5 (3rd Cir. 1939); and *Western States Mach. Co. v. S.S. Hepworth Co.*, 152 F.2d 79, 80, ¶4 (2nd Cir. 1945).

[23]*Caradelis v. Refineria Panama, S.A.*, 384 F.2d 589, 491, fn. 1 (5th Cir. 1967), citing *Gloria S/S Co., Inc. v. Smith*, 376 F.2d 46 (5th Cir. 1967).

Running as an undercurrent throughout the Petition — because it ruled against him — is Sibley's lament that the Fifth Circuit should not have even considered Tandy's appeal and in fact lacked power to reverse the Trial Court's judgment because based on jury verdict. To sustain such a contention would render any trial court's error self-immunizing from review. To hold that Tandy's contractual and statutory entitlement to arbitration was forever lost, because the trial judge erroneously denied it and thereafter held a jury trial, not only would controvert the very purpose of appellate review but would preclude orderly development of appellate case law in any instance where a jury trial had been erroneously conducted.

If an appellate court lacks power to enforce the "unmistakably clear congressional purpose"[24] behind the United States Arbitration Act, how else can that congressional policy be served and protected when subverted by a trial court?

Sibley's precise argument has already been laid to rest by cases like *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 929 (5th Cir. 1970) where, following another erroneous denial by a trial judge of a motion to stay to permit arbitration, the appellate court reversed and ordered arbitrable issues to be arbitrated even though already

[24]". . . that the arbitration procedure, when selected by the parties under a contract be speedy and not subject to delays and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin*, 388 US 395, 404 (1967).

"The United States Arbitration Act, now 9 USC §§1, et seq . . . was designed to allow parties to avoid 'the costliness and delays of litigation'. . . HR Rep No 96, 68th Cong, 1st Sess, 1, 2 (1924) . . . ." *Scherk v. Alberto-Culver Co.*, 417 US 506, 510-11 (1974).

once judicially litigated, holding:

> "[T]he factors of delay and possible double expense, arising from the court's determination of the initial issue, is not a basis for denying the arbitration otherwise available by reason of that determination."

Finally Sibley argues (Petition, p. 19, et seq) that to stay trial of non-arbitrable issues pending arbitration of arbitrable ones "improperly reconciles the federal policy favoring arbitration" with the doctrine of *Wilko* precluding waiver in advance of the right to litigate claims of federal securities act fraud. In order to make this argument Sibley must resort to the insupportable claim that the Fifth Circuit opinion has in fact denied him the right to ever litigate such non-arbitrable issues. He pretends (Petition, p. 21) that, if the Trial Court had initially granted Stay of the fraud issues, he would have forever been denied his right to judicial discovery. He misrepresents (p. 21) three of his exhibits: Nos. 29, 32 and 41.

The first, Pl. Ex. 29, has already been shown to have been but a PW draft of the 1971 audit report, so expressly qualified as to indicate nothing (see *supra*, p. 9).

The second, Pl. Ex. 32 (admitted A. 629), was a memorandum of Tandy's Vice President and Treasurer Tindall (A. 602), who testified it "had nothing to do with the inventories purchased in Hickok" (A. 631). Nor did any *witness* claim it did, although at trial and on appeal Sibley's counsel has sinisterly referred to this memo as the "game plan." The Tindall memo, prepared during the negotiation stages, dealt

entirely with two alternate accounting methods by which to account for the Parker-Hickok acquisition on *Tandy's books* if the negotiations resulted in consummation.

Mr. Tindall was considering the pros and cons of whether, if made, the acquisition should be treated on Tandy's books as a "purchase" or instead as a "pooling of interests," the two generally accepted accounting methods of treating an acquisition on the books of the acquiring corporation. His memo pointed out that if the acquisition were treated as a "purchase" that "an allocation of purchase price"[25] could be made so that the expense of relocating the Hickok operation in Texas would not affect Tandy's earnings accounting-wise (such a treatment would have no effect income-taxwise). Clearly, the memo considered the accounting treatment to be reflected on *Tandy's* books, *not Parker's* books, because no such allocation could be reflected on the books of the company being acquired. This was the *sole* subject of Mr. Tindall's memo as he positively testified (A. 628-33). Irrespective of which alternative accounting method was chosen, there would be no effect on the purchase price to be paid by Tandy to the Parker shareholders.

The third, Pl. Ex. 41, was not a "false" certificate

[25]Similiar allocation was made on Parker's books when it acquired Hickok as a "purchase" in early 1970. Hickok had a deficit net worth and the acquisition cost exceeded that capital deficiency by some $2.6 million. Hence an allocation was required on the books of Parker as the acquiring corporation (Note B to Leidesdorf 12/31/70 audit report, Pl. Ex. 5, A. 1747, admitted A. 256). Such allocation did *not* affect the *Hickok* books, which continued to show a deficit net worth at 12/31/70 (Pl. Ex. 7, A. 1754, admitted A. 256).

and it is absurd to suggest (Petition, p. 16) that a reputable public accounting firm, before certifying a $5,800,000 inventory, did nothing but glance at this two-paragraph letter. Chait, PW's Manager of the 1971 audit did *not* testify, as claimed by the Petition (p. 16), that "without such a document PW would never have issued its audit. . . ." To the contrary, Chait testified that he had already obtained the same information "which was verbally expressed to us during the course of our examination" (A. 1400).

In answer to a *hypothetical* question of Sibley's counsel, Chait did indicate that if the information contained in the document had been false, he would not have signed the audit (A. 1400-1401). But this would have meant the verbal information obtained during the PW field audit was false. There was no proof the information was in fact false. The document was not "proven at trial to have been completely phony" as contended by the Petition (p. 16). Neither the Appendix references given by the Petition (p. 16), which we invite the Court to examine, nor any of the other evidence supports such a scandalous charge.

But all this "jury argument"[26] of Petitioner has no proper place in a Petition for Writ of Certiorari. The Petition (p. 2) invokes jurisdiction under 28 USC §1254(1), Therefore, under this Court's Rule 19(1)(b), the question the Petition presents for determination is simply whether the Court of Appeals —

[26]The Petition (p. 17) even deems pertinent a so-called "offer" of P. J. Parker to purchase all the marked down inventory. Such argument has no place in the Petition, especially in view of the fact that the Trial Court sustained Tandy's objection to the evidence and thereby eliminated it from the case (A. 1412).

either in controvention of an opinion of this Court, in conflict with an opinion of another Court of Appeals on the same matter, or in considering an important question of federal law which has not been but should be settled by this Court — has committed such action by ordering arbitration of arbitrable contractual issues prior to judicial resolution of non-arbitrable issues, if not mooted, as to properly call for an exercise of this Court's power of supervision.

No such need is shown by the Petition. This Court will not grant certiorari to afford further audience to private litigants disputing "corporate valuations centered around complex issues of accounting and valuation."[27] Such a dispute presents no matter of public import. Under the ruling of the Fifth Circuit, Respondents are to be afforded their contractual and statutory right to arbitration of the arbitrable issues drawn by the pleadings of the parties, and Sibley thereafter is to be accorded his right to judicial litigation of the non-arbitrable issues if they have not been mooted by that arbitration. The concluding paragraph of the Fifth Circuit's opinion on rehearing makes this clear:

> "The suggestion is made that our opinion cuts off Parker from asserting after arbitration any securities law claims it might have. We have not intended to suggest that. We did, and do, suggest that in a practical sense arbitration first in time might have disposed of this suit and, if not, might have limited its scope and clarified it. And it still might."

[27] Fifth Circuit Opinion below (A. to Petition, p. 10).

CONCLUSION

Petitioner has failed to demonstrate that there are any grounds for the exercise of this Court's discretionary certiorari jurisdiction. The holding in the Fifth Circuit conflicts with no decision of another Court of Appeals nor of this Court. The Court of Appeals has not erroneously decided an important question of federal law nor is any important question of federal law presented by the Petition.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Cecil E. Munn
Counsel for Respondent
Tandy Corporation

Of Counsel:
Sloan B. Blair
Charles L. Stephens

June 18, 1977.

CERTIFICATE OF SERVICE

I, Cecil E. Munn, counsel for Tandy Corporation, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of June 1977 service of this BRIEF IN OPPOSITION to the PETITION FOR WRIT OF CERTIORARI has been made upon Petitioner Harper Sibley, Jr. by mailing three copies thereof by United States mail postage prepaid to Marvin S. Sloman at his office at 3000 One Main Place, Dallas, Texas 75250, counsel of record for Petitioner.

Cecil E. Munn
1800 First National Building
Fort Worth, Texas 76102
Counsel for Respondent
Tandy Corporation

Supreme Court, U. S.
FILED
JUN 28 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1614

HARPER SIBLEY, JR.,

Petitioner,

v.

TANDY CORPORATION, ET AL.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT TANDY'S BRIEF IN OPPOSITION

MARVIN S. SLOMAN,
ROBERT L. BLUMENTHAL,
EARL F. HALE, JR.,
ROD PHELAN,

CARRINGTON, COLEMAN, SLOMAN,
JOHNSON & BLUMENTHAL,
2000 One Main Place,
Dallas, Texas 75250,
(214) 741-2121,

Attorneys for Petitioner.

TABLE OF AUTHORITIES CITED

Cases

	Page
Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974)	9
General Guaranty Insurance Co. v. New Orleans General Agency, Inc., 427 F.2d 924 (5th Cir. 1970)	6
Necchi v. Necchi Sewing Machine Sales Corp., 348 F.2d 693 (2d Cir. 1965)	3, 4, 5
Shapiro v. Jaslow, 320 F. Supp. 598 (S.D.N.Y. 1970)	2
Wilko v. Swan, 346 U.S. 427 (1953)	1, 2, 5n, 8-10

Statutes and Rules

15 U.S.C. § 78cc(a)	8
28 U.S.C. § 1404(a)	3n
28 U.S.C. § 1292(b)	4n
Rule 54c, Federal Rules of Civil Procedure	4

Other Authorities

1 Moore's Federal Practice, ¶ 0.147, p. 1697-98	3n

In the

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1614

HARPER SIBLEY, JR.,

Petitioner,

v.

TANDY CORPORATION, ET AL.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT TANDY'S BRIEF IN OPPOSITION

Petitioner believes it will be most helpful to this Court to view the Petition for Writ of Certiorari ("Petition") and Respondent Tandy's Brief in Opposition ("Respondent's Brief") within the framework of what Petitioner submits are five fundamentally important questions of law subsumed within the two broad questions raised by the Petition and the decision below, and now crystallized by Respondent's joinder of issue.

1. Whether the Court of Appeals for the Fifth Circuit erred — and in so doing undermined the Wilko *doctrine*[1] *— in failing to recognize that the concededly non-arbitrable "fraud facts" are one and the same as the "contract facts" and the "conversion facts"?*

Petitioner, the Court of Appeals for the Fifth Circuit, and, apparently, Respondent all agree that the appropriate inquiry

[1] In *Wilko v. Swan*, 346 U.S. 4237 (1953), this Court ruled that claimed violations of the antifraud provisions of the federal securities laws could not be arbitrated, even when the parties had contractually agreed to arbitrate all disputes between them. *See* Petition, p. 7, n. 3.

is whether an arbitrator must entertain the same facts as give rise to the non-arbitrable claims of fraud, and that if he must, arbitration must be denied. (See Petition, pp. 7-8; 543 F.2d 540, 543, n. 4, and accompanying text.) Petitioner contends that the decision below erred in failing to make that inquiry and in choosing instead to imply that the arbitrable and non-arbitrable claims in this case were "factually severable" at the time of the original complaint, 543 F.2d at 543. (The Court of Appeals did not make any findings directed to the severability of the facts and claims proven at trial.) The truth is that no amount of analysis, and no application of notions of "dependency," "legal intertwinement," and "somewhat intertwined and overlapping" will permit any tribunal — much less the parties — to attach different legal labels to the facts of this dispute. As demonstrated in the Petition (pp. 13-19), the fraud facts, the contract facts and the conversion facts in this case are all the same.

Respondent's Brief does not challenge this conclusion, but instead implicitly concedes that the arbitrator will now necessarily hear the same evidence as has given rise to jury findings of fraud, unless this petition is granted and the decision below reversed.

Because the "severability" test derives from *Wilko's* prohibition against arbitration of securities fraud claims, see, *e.g., Shapiro v. Jaslow*, 320 F. Supp. 598 (S.D.N.Y. 1970), the decision below conflicts with the spirit of that prohibition by ordering the parties to present to the arbitrator claims which will unavoidably include and be based upon evidence of fraud. (Petition, pp. 13-19) This Court's writ should issue to prevent this erosion of the *Wilko* rule.

2. *Whether trial court determinations of arbitrability should be reviewed for an abuse of discretion, or decided* de novo *by the appellate court?*

Until now, determinations of arbitrability were considered discretionary matters for the trial court (Petition, p. 8). The Fifth Circuit failed to find that the trial court abused its discretion in this case.[2] The absence of such a finding makes it obvious that the decision below stands for the propriety of *de novo* appellate determinations of arbitrability, even after a trial on the merits. (Petition, pp. 11-13) Petitioner submits that even if the Fifth Circuit had fashioned an understandable standard for making arbitrability determinations in the first instance — and the standard established here is impossibly obscure — its requirement of *de novo* determinations on appeal injects an unacceptable element of uncertainty into both the judicial system and the arbitration system, for it casts a terrible cloud over everything that happens following the trial court determination. (Petition, pp. 8-13, 19)

Respondent's answer to this contention is not to deny the almost impossible uncertainties created by a *de novo* standard, but to argue that the Second Circuit has previously approved such a procedure. (Respondent's Brief, p. 25, citing *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693 (2d Cir. 1965)). The *Necchi* case involved an appeal on the question of arbitrability *before* either a court or an arbitrator

---

[2] The Fifth Circuit did find that the trial court chose "a course 180 degrees off the correct one" (Opinion on Petition for Rehearing), thereby persuading Respondent to conclude that the decision below "amounts to one that the trial court abused her discretion." Respondent's Brief, p. 24) But of course any decision that must go one way or another — either you arbitrate or you don't — is "180 degrees off" if someone disagrees with it. And that is all the decision below reflects — a disagreement with the trial court's judgment. That is a far cry from a finding of abuse of discretion.

Because what is at stake on a motion to stay pending arbitration is the choice of forum, the trial court's decision is analagous to the one it makes on a venue motion under 28 U.S.C. § 1404(a). That decision is discretionary, and except for an abuse of discretion, "ordinarily the district court's ruling will not be disturbed on final appeal." 1 *Moore's Federal Practice*, ¶ 0.147, p. 1697-98.

had made any decision on the merits. One cannot quarrel with a *de novo* determination made at this juncture; but Respondent here made no effort to appeal, failing even to seek certification of the arbitrability question under 28 U.S.C. § 1292(b). In the absence of a required interlocutory appeal, *de novo* review makes no sense at all. If the trial court is to have no discretion on the arbitrability determination, then this Court should grant this writ to review the ancient distinction between interlocutory appealability of orders refusing to stay suits seeking any equitable relief (not appealable) and those seeking exclusively legal relief (appealable). (See Respondent's Brief, pp. 26-27) Particularly with *de novo* review, it is illogical to determine the interlocutory appealability of so fundamental an order on the basis of whether the pleadings included a prayer for equitable relief. This is especially so in view of Rule 54(c) of the Federal Rules of Procedure, which requires a court to award whatever relief the prevailing party is entitled to, whether or not his pleadings request it.[3]

Further, in *Necchi* the district court had failed to rule on the several questions of arbitrability, but instead had left them to the arbitrator; thus the Second Circuit, in a commendable effort "to expedite this litigation," 348 F.2d at 697, decided the arbitrability of the items in dispute. That decision had exactly the opposite effect of the decision below, which not only fails to tell the parties and the arbitrator what facts have been deemed arbitrable "non-fraud"

[3] Of equally basic importance is the question of whether a party seeking to stay litigation should be required to request certification of the arbitrability question for interlocutory appeal under 28 U.S.C. § 1292(b). In the absence of such a requirement, there is a great disincentive to do the sensible and economical thing: take the arbitrability question up before the parties and the courts have wasted their resources and time on a trial which can be mooted if an appellate court views the arbitrable and non-arbitrable facts and issues as only "somewhat intertwined" instead of "legally intertwined."

facts, but also immeasurably delays the ultimate resolution of this controversy.

Petitioner therefore submits that neither *Necchi* nor any other case sanctions the resort to *de novo* appellate determinations of arbitrability *after* a resolution on the merits (whether by a court or an arbitrator). The decision below conflicts with the cases establishing the proposition that the arbitrability determination is discretionary and with those confirming the discretionary nature of trial court determinations of venue motions. (See note 2, *supra*). These conflicts virtually ensure enormous waste and delay.

Because this issue is so important, and has never before been decided by this Court, a writ of certiorari should issue to review and reverse the decision below, and to establish an abuse of discretion standard for review of trial court arbitrability determinations.

3. Whether the precedent established by the decision below — arbitration of fully litigated claims after de novo *review of the question of arbitrability — will produce waste and delay, in this case and cases to follow, thereby defeating the aims of the Federal Arbitration Act?*

Petitioner contends that one of the most fundamental errors of the decision below, and its greatest irony, lies in the unavoidable waste and delay effected by its holding — in this case and in those to follow. (See Petition, p. 19) Insensitive to the views of this Court[4] (as well as those of Congress[5]) as to the principal aims of arbitration — speed and economy — the decision below requires an arbitrator to hear facts on which a jury verdict of fraud has been handed down, and may ultimately force Petitioner to prove three

[4] *Wilko v. Swan*, 346 U.S. at 431-32, 438.
[5] See *Wilko v. Swan*, 346 U.S. at 432, n. 12 and accompanying text.

times that Respondent's claim to the escrowed stock was and is knowingly false.

Respondent's answer to this plainly inappropriate specter of things to come is not to defend it, but to claim that the Fifth Circuit has previously sanctioned it in another case. Respondent argues that *General Guaranty Insurance Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970), holds that it is appropriate to order arbitration of issues "already once judicially litigated." (Respondent's Brief, pp. 28-29) That case holds just the opposite. The court of appeals there held that questions decided by the trial court should not be sent to arbitration, but should be deemed "finally determined for all parties and for all purposes," 427 F.2d at 930. Only questions not yet passed on by a court could properly be sent to arbitration. *Id.* Thus what we have, in a case viewed by Respondent as controlling, is a holding squarely in favor of Petitioner: there is no reason to order duplicative arbitration of issues already decided by a court. In fact, the case at bar is the only one Petitioner has found which orders arbitration of fully-litigated issues — or vice-versa.

This Court should issue its writ to protect against judicial defeat of the aims of arbitration, and to insure a sensible administration of our overall system of dispute-resolution: the courts should not be run in such a way as to foster redundant proceedings.

4. Whether the test for determining arbitrability established by the decision below is either understandable or capable of being applied?

The arbitrability test established by the decision below is as follows: a dispute must be deemed wholly non-arbitrable if the arbitrable and non-arbitrable issues are "intertwined

in the legal sense" (543 F.2d at 543), but partly arbitrable if those issues are "[only] to some degree intertwined and overlapping" or "dependent" (543 F.2d at 543-544). (Petition, p. 8) Petitioner contends that test is nonsensical. (Petition, pp. 8-11)

Respondent's answer to this contention is to assert that there is a difference between saying what the Fifth Circuit said — that in the instant case, "unquestionably, the *facts* are to some degree intertwined and overlapping" — and saying what Petitioner said about the Fifth Circuit's test — that the *issues* are somewhat intertwined and overlapping. (Respondent's Brief, p. 19) That difference is so semantic it is specious. Facts create issues; hence it is a truism that the issues are intertwined and overlapping if the facts are. Thus the Fifth Circuit was saying — really quite clearly — that even though the arbitrable and non-arbitrable facts and issues in this case are "unquestionably to some degree intertwined and overlapping," 543 F.2d at 544, arbitration is nonetheless necessary, because the facts and issues defined by the superseded original complaint were not "legally intertwined."

This Court has never decided the appropriate test of arbitrability where both arbitrable and non-arbitrable claims are made. A practical, understandable test is of vital importance to our system of justice. The test emanating from the decision below is neither. This Court's writ should issue to restore reason to this area of the law.

5. Whether the decision below erred in deciding the question of arbitrability on the basis of a superseded pleading?

On the basis of "the claims made in the original complaint," the Court of Appeals decided to send this case to arbitration

despite a full judicial resolution of the controversy. 543 F.2d at 543. (Petition, p. 22, n. 12) Petitioner has shown that as a result of discovery, the original complaint was amended to delete the several words on which the Court of Appeals grounded its decision and its "dependency" notion — so that the case was tried on the basis of an *independent* fraud claim, which the jury sustained. (*Id.*) Petitioner contends that this failure to decide the case on the basis of the entire record — which explains the appellate court's failure to comprehend that the fraud facts in this case are the same as the contract and conversion facts (see Petition, pp. 13-19) — is error so fundamental as to deprive him of a right vouchsafed by Section 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a), and by this Court's *Wilko* decision: the right to enjoy the fruits of a trial of claimed and proven violations of the federal securities laws.

Respondent's argument — that it was appropriate for the Fifth Circuit to decide the case on the basis of the superseded original complaint because "that was the only pleading of Petitioner before the trial court when it ruled on the Motion to Stay" (Respondent's Brief, p. 16, n. 12) — ignores the conflict between the decision below and those many cases holding that an amended pleading supersedes a prior one, thus preventing the prior pleading from being used like the Court of Appeals used it here — as a legal admission. (See Petition, p. 22, n. 12)

The trial judge's denial of arbitration was proven by discovery and by the actual trial itself to be completely correct. That initial determination — that the facts creating the arbitrable and non-arbitrable claims in this case are intertwined — is no longer challenged by Respondent, which has made not one single effort to dispute this contention, as

outlined on pages 13-19 of the Petition. It is sophistry to ignore the impact of subsequent discovery, pleading amendments and proof upon the trial court's arbitrability determination.

The effect of this failure to examine the entire record in deciding arbitrability is to undermine the *Wilko* rule by depriving Petitioner of the fruits of the trial mandated by *Wilko*. It is also to ignore what this Court has observed are the serious shortcomings of arbitration — including discovery limitations which might well have prevented Petitioner from uncovering the facts which led to his amended complaint (see Petition, p. 21) and successful trial of his fraud claims. See *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 57-58 (1974).

This Court should grant the Petition, to resolve the conflict between the decision below and the cases holding that an amended pleading is the controlling one on appeal, and to prevent further encroachment on the *Wilko* rule.

CONCLUSION

Petitioner submits that this controversy has generated a number of fundamentally important questions of law, some of which are significant because they present conflicts between the decision below and the decisions of other circuits (see, *e.g.*, items 2 and 5, *supra*), others of which are important because they conflict with the spirit of this Court's decision in *Wilko v. Swan* (see, *e.g.*, items 1 and 5), and still others which are critical simply because of their profound impact upon the administration of justice (see, *e.g.*, items 2, 3 and 4). Petitioner requests this Court to issue a writ of certiorari to review the judgment and opinions of the

Fifth Circuit Court of Appeals, and establish appropriate standards and procedures for determining and reviewing questions of arbitrability.

Respectfully submitted,

MARVIN S. SLOMAN,
ROBERT L. BLUMENTHAL,
EARL F. HALE, JR.,
ROD PHELAN,

CARRINGTON, COLEMAN, SLOMAN,
JOHNSON & BLUMENTHAL,
3000 One Main Place,
Dallas, Texas 75250
(214) 741-2121,

Attorneys for Petitioner.

I, Marvin S. Sloman, counsel for Harper Sibley, Jr., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on June ..., 1977, I served three copies of the foregoing Reply to Respondent Tandy's Brief in Opposition by mailing same by United States mail, postage prepaid to Cecil E. Munn at his office at 1800 First National Building, Fort Worth, Texas 76102, counsel of record for Respondent.